TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 117.

GEORGE C. BECKWITH, PLAINTIFF IN ERROR,

vs.

CHALMERS W. TALBOT.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF COLORADO.

FILED SEPTEMBER 13, 1875.

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1 In the supreme court of the Territory of Colorado.

Pleas before the judges of the supreme court of the Territory of Colorado, at the city of Denver, in the county of Arapahoe, at the February term of said court, held in said city on the second Tuesday of February, one thousand eight hundred and seventy-five.

Witness the honorable Moses Hallett, chief-justice of said court.

JNO. W. WEBSTER, *Clerk.*

2 GEORGE C. BECKWITH, plaintiff in error, *vs.* CHALMERS W. TALBOT, defendant in error. } Error to supreme court Colorado Territory.

3 TERRITORY OF COLORADO,
County of Pueblo, ss:

Pleas before the Hon. Moses Hallett, chief-justice of Colorado Territory, and judge of the district court of the third judicial district of said Territory, at a term of said court within and for the county of Pueblo, begun and held at the court-house in the city of Pueblo, in said Pueblo County, and Territory aforesaid, on Tuesday, the third day of June, in the year of our Lord one thousand eight hundred and seventy-three.

Present, Hon. Moses Hallett, judge of the district court of the third judicial district of Colorado Territory; Geo. A. Bute, clerk of said court; Abe R. Ellis, sheriff of Pueblo County.

Be it remembered that heretofore, to wit, on the fourth day of June, in the year of our Lord one thousand eight hundred and seventy-three, the clerk of said court received from the clerk of the district court of the third judicial district of Colorado Territory, within and for the county of Fremont, a certain transcript, with certain papers attached there-

4 to; which said transcript and papers were filed in his office, and which said transcript and papers, with the respective endorsements thereon, are in words and figures following, to wit:

TERRITORY OF COLORADO,
County of Fremont, ss:

Pleas before the district court of the third judicial district of Colorado Territory, within and for the county of Fremont, at the May term, A. D. 1873, of said court.

Present, Hon. Moses Hallett, chief-justice and judge of the third judicial district.

GEORGE T. PHILLIPS,
Deputy Sheriff Fremont County.

Attest: GEORGE A. BUTE,
Clerk of said court,
Per JOHN WILSON, *Deputy.*

Be it remembered that on the twenty-seventh day of May, A. D. 1873, the same being one of the days of the regular May term of said court, in the year one thousand eight and seventy-three, the following proceedings were had and entered upon the records of said court, to wit:

CHALMERS W. TALBOT, PLAINTIFF, *vs.* GEORGE C. BECKWITH, DEFENDANT. } Assumpsit.

5 This day came the said parties, by their respective attorneys,

and George A. Hinsdale, esq'r', of counsel for said defendant, gave notice in open court that he would, during the present term of this court, apply for a change of venue herein.

And, on motion of said defendant, by his attorney, leave is granted him until the incoming of the court on the 29th inst. to plead to said plaintiff's declaration herein.

And afterwards, to wit, on the 30th day of June, A. D. 1873, the same being one of the days of the regular May term, A. D. 1873, of said court, the following proceedings were had and entered upon the record thereof:

CHALMERS W. TALBOT, PL'FF,
vs.
GEORGE C. BECKWITH, DEF'T. } Assumpsit.

Now on this day comes the said plaintiff, by Tho's Macon, esq'r', his attorney, and the said defendant, by George A. Hinsdale, esq., his attorney, and this cause is heard on defendant's demurrer to the declaration of the plaintiff.

After argument of counsel, it is considered that the said demurrer be sustained as to the first and third counts, and overruled as to the
6 second and fourth counts.

And afterwards, to wit, on the 31st day of May, A. D. 1873, the defendant, George C. Beckwith, by his attorney, filed in said court his motion and petition for change of venue in this cause, with affidavits attached thereto; which said several papers are in the words and figures following, to wit:

TERRITORY OF COLORADO,
County of Fremont, ss:

In the judicial court of the third judicial district of this Territory of Colorado, sitting in and for the county of Fremont.

CHALMERS W. TALBOT
vs.
GEORGE C. BECKWITH. } In an action of assumpsit.

And now comes George C. Beckwith, the defendant in said cause, by Hinsdale & Boss, and moves the court for a change of venue in said cause for the reasons set forth in the attached petition and accompanying affidavits.

By HINSDALE & BOSS,
His Attorneys.

Petition for change of venue.

TERRITORY OF COLORADO,
County of Fremont, ss:

In the district court of the third judicial district of Colorado, in and for the county of Fremont.—To the May term, A. D. 1873.

7 CHALMERS W. TALBOT
vs.
GEORGE C. BECKWITH. } In an action of assumpsit.

George C. Beckwith, the defendant in the above-entitled cause, respectfully represents to the judge of said court that the inhabitants of

Fremont County are prejudiced against the petitioner, so that he fears he cannot receive a fair trial in said court, where said cause is now pending; and petitioner here sets forth as the grounds upon which said fears are based, that he is engaged in said county in the business of herding and raising cattle, and that he constantly keeps in said county a large herd of cattle; and that a large proportion of said inhabitants of Fremont County are engaged in the same business; and that it is commonly charged on their part that the business of petitioner is prejudicial to their interest by reason of the fact that the cattle of petitioner consume and destroy a large part of the range of stock.

Petitioner further states that frequent hostile expressions on the part of many citizens of said county have come to his knowledge, by which the most intense prejudice against the petitioner is shown by
8 them; and petitioner is advised and knows that about one month ago a secret meeting, attended by between thirty and forty persons, residents of the said county, was held in Wet Mountain Valley, in said county, for the sole purpose of devising means by which this petitioner might be driven from the county and forced to remove his herd therefrom; and the petitioner has been informed that at said meeting threats of violence were freely made against the petitioner, which threats were favorably received by almost all the persons who were present.

Petitioner further states that, on or about the 15th day of April, A. D. 1873, a citizen of said county rode in great haste to where this petitioner was then staying, on purpose to advise him that a mob of seven or more men was then being organized in said county for the purpose of inflicting mob violence upon the person of the petitioner, and that they were threatening his life; and petitioner states that he is advised and believes that said purpose was then on the point of being carried out, but was abandoned temporarily for some cause to petitioner unknown.

Petitioner further states that since he contemplated making this change of venue here sought, he has approached four or five
9 citizens of said county for the purpose of asking them to make voluntary affidavits of the facts within their knowledge touching the existing prejudice against the petitioner in said county; and that said persons have stated that they knew there was a violent prejudice against petitioner, but that they were unwilling to make them. Some of said persons saying that if they should do so, they would bring upon themselves the ill-will and hatred of their neighbors.

Petitioner further states that he is informed and believes that said Chalmers W. Talbot has recently been in the habit of stating to many citizens of said county that he has been greatly wronged by the petitioner, and that he pursued this course until he has excited a popular sympathy in his own favor against the petitioner, by means whereof has acquired an undue influence in said county. For other reasons, he is advised and believes that it is impossible for him to secure a fair trial in Fremont County. Petitioner therefore prays for a change of venue herein, in accordance with the statute in such case made and provided.

GEORGE C. BECKWITH.

10 TERRITORY OF COLORADO,
County of Fremont, ss:

George C. Beckwith, the above-named petitioner, being duly sworn according to law, on oath states that the matters set forth in the foregoing petition are true in substance and fact.

GEORGE C. BECKWITH.

Subscribed and sworn to before me this 30th day of May, A. D. 1873.

GEO. A. BUTE,
Clerk District Court,
Per JOHN WILSON,
Deputy.

TERRITORY OF COLORADO,
Fremont County, ss:

Henry H. Tomkins, being duly sworn, deposes and says that he is a merchant, and resides in Cañon City, in said county of Fremont, and has resided there during the last twenty months, and that he has known George C. Beckwith for more than one year; that on account of his business, he, the said affiant, is well acquainted throughout the said county of Fremont, and has frequent opportunities to hear the *the* conversations of a great number of persons in said county about current matters in the neighborhood, and that he has frequently heard the said Beck-
11 with and his business spoken of, and the comments were generally of an unfriendly character, and that from frequent expressions of hostility which he has heard he is satisfied that a deep-seated prejudice exists in the minds of a large proportion of the inhabitants of said county against the said George C. Beckwith, which would prevent his receiving a fair and impartial trial in the district court of said county in any matter in which he is concerned.

HENRY H. TOMKINS.

Subscribed and sworn to before me this 28th day of May, A. D. 1873.

JOHN WILSON,
Deputy,
For GEO. A. BUTE,
Clerk District Court.

TERRITORY OF COLORADO,
Fremont County, ss:

Henry N. Webb, being first duly sworn, deposes and says that he is a merchant, residing at said Cañon City, in said county of Fremont, and that he has resided there for three years, and that he has known George C. Beckwith for two years last past; that he knows that the said Beckwith conducts a large business in said county, and is generally known throughout said county personally or by reputation; that affiant's own business frequently brings him in contact with the people, and
12 he has frequently heard the business of said Beckwith discussed, and has also frequently heard expressions about the said Beckwith of an unfriendly character, from which affiant is satisfied that a prejudice exists against the said Beckwith which would prevent his receiving a fair trial in the district court of said county in any case in which he is or may be interested.

HENRY N. WEBB.

Subscribed and sworn to before me this 28th day of May, A. D. 1873.

JOHN WILSON,
Deputy,
For GEO. A. BUTE,
Clerk District Court.

TERRITORY OF COLORADO,
County of Fremont, ss:

John L. Camblin, being first duly sworn, deposes and says that he resides in Pleasant Valley, in said county of Fremont, and that he has

been acquainted with George C. Beckwith for a little more than one year; that he is well acquainted with the people living in Wet Mountain Valley and Pleasant Valley and other parts of the county, and that he has heard the business affairs of the said Beckwith very generally discussed, and that the expressions of the people in such discus-
13 sions are almost uniformly unfriendly towards the said Beckwith, and that an unfriendly feeling exists against him, particularly in the western portion of said county. Affiant further states that within the last three days, in Cañon City, he has heard of and concerning the said Beckwith and his business affairs expressions of this character, "That if they were not convicted in these cases there is a higher law," an' other expressions of like import.

J. L. CAMBLIN.

Sworn to and subscribed before me this 28th day of May, A. D. 1873.

JOHN WILSON,
Deputy Clerk,
For GEO. A. BUTE,
Clerk of the District Court.

TERRITORY OF COLORADO,
County of Fremont, ss:

George Lee, being first duly sworn, upon his oath deposes and says that he is, and has been for a period of three years last past, a resident of Wet Mountain Valley, in the county of Fremont aforesaid, and that during nearly all that length of time he has been acquainted with George C. Beckwith, whom he is informed is defendant in a cause pending in the district court of Fremont County, Colorado, in which
14 said Chalmers W. Talbott is the plaintiff. Affiant further states that he is acquainted with the greater part of the inhabitants of Wet Mountain Valley, in said county of Fremont, and he knows that among the greater portion of the inhabitants of said valley there exists a prejudice against the said George C. Beckwith, and that he has frequently heard expressions of hostility by many of said inhabitants against the said Beckwith, and that said hostility arises out of the fact that said Beckwith owns a large number of cattle, which are pastured in said valley and in the adjacent country.

And affiant further states, from his knowledge of the public sentiment towards the said Beckwith in Fremont County, he is well satisfied that he would not receive a fair and impartial trial in said county in any case arising out of his conduct of said business of herding and dealing in stock; and further the deponent says not.

GEORGE LEE.

Subscribed and sworn to before me this 27th day of May, A. D. 1873.

JOHN WILSON,
Deputy,
For GEO. A. BUTE,
Clerk District Court.

15 TERRITORY OF COLORADO,
County of Fremont, ss:

George Ritter, being first duly sworn, deposes and says that he resides in Wet Mountain Valley, in said county, and has resided there for about three years, and has been acquainted with George C. Beckwith for that length of time, and that the said Beckwith, during that time has been the owner of large herds of cattle which were kept in said county

That he has heard, among the people of said county, frequent discussions concerning the said Beckwith and his business, and that as a general thing the expressions are unfriendly toward the said Beckwith.

And affiant further states that he believes, from the character of the different conversations he has heard about and concerning the said Beckwith, that a prejudice of an intense character exists in said county against the said George C. Beckwith.

And further deponent says not.

GEORGE RITTER.

Sworn to and subscribed before me this 28th day of May, A. D. 1873.

JOHN WILSON,
Deputy,
For GEO. A. BUTE,
Clerk District Court.

16 TERRITORY OF COLORADO,
Fremont County, ss:

William H. Phelps, being first duly sworn, deposes and says that he resides in Wet Mountain Valley, in said county, and has lived there over one year, and has known George C. Beckwith during said time, and that he is acquainted with a large portion of the inhabitants of Wet Mountain Valley, and has frequently heard expressions of hostility towards said Beckwith among the people of said valley and other portions of this county, and that there exists against the said Beckwith in said county a deep-seated prejudice, arising out of the fact that he keeps in said county a large number of cattle, which are alleged to consume and destroy the range for other stock.

Affiant further says that, from the knowledge of the feeling and prejudice existing against said Beckwith in this county, he is satisfied that he cannot have a fair and an impartial trial in said county of Fremont in any case growing out of his conduct of his business in the raising and herding of cattle.

WILLIAM H. PHELPS.

17 Subscribed and sworn to before me this 28th day of May, A. D' 1873.

JOHN WILSON,
Deputy,
For GEO. A. BUTE,
Clerk District Court.

And afterwards, on the same day, to wit, on the thirty-first day of May, A. D. 1873, the same being one of the days of the regular May term, A. D. 1873, of said court, the following proceedings were had and entered upon the record of said court:

CHALMERS W. TALBOT, PLAINTIFF,
vs.
GEORGE C. BECKWITH, DEFENDANT. } Assumpsit.

On this day the said defendant in person, and by G. A. Hinsdale, his attorney, came and filed his petition for change of venue herein, and thereupon moves the court to change the venue in this cause, and the said plaintiff, by Tho's Macon, his attorney, also came, and, after argument of counsel, it is considered by the court that the venue in this cause be changed to the county of Pueblo, in the third judicial district of this

Territory, and that this cause be transmitted to the district court of the third judicial district of Colorado Territory, within and for the
18 county of Pueblo, for further proceedings according to law; provided that the said defendant shall first pay the costs by him made in this court in this cause, together with the costs of the change of venue herein, to be taxed, and thereupon the judge of this court filed herein his order directing a change of venue in this cause as aforesaid; which said order of the judge is in words and figures folllowing, to wit:

In the district court of the third judicial district of Colorado Territory within and for the county of Fremont.—Of the May term, A. D. 1873.

CHALMERS W. TALBOT } *vs.* } Assumpsit.
GEORGE C. BECKWITH. }

On this day the said defendant in person, and by Geo. A. Hinsdale, his attorney, came and filed his petition for change of venue in this cause, and thereupon moves the court to change the venue herein, and the said plaintiff, by Tho's Macon, his attorney, also came, and, after argument of counsel it is considered by the court, and by the judge thereof, that the venue in this cause be changed to the county of Pueblo, in the third judicial district, and that this cause be transmitted to
19 the district court of the third judicial district of Colorado Territory, within and for the county of Pueblo, for further proceedings according to law; provided that the said defendant shall first pay the costs by him made in this court, together with the costs of the change of venue herein, to be taxed.

Witness my hand this 31st day of May, A. D. 1873.

MOSES HALLETT,
C. J. & Judge, &c.

TERRITORY OF COLORADO,
County of Fremont, ss:

I, George A. Bute, clerk of the district court of the third judicial district of Colorado Territory, within and for the county of Fremont, do hereby certify that the foregoing pages contain a full, true, complete, and perfect transcript of the record and proceedings in said court in a certain cause wherein Chalmers W. Talbot is plaintiff and George C. Beckwith is defendant.

And I further certify that a motion and petition for change of venue, and seven different affidavits in support of said petition, and also the order of the judge of said court directing a change of venue in said suit, have been filed in my office, of each of which a true copy is also contained in said pages.

And I further certify, that the papers hereto attached, marked "A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P," are all the papers filed
20 in said cause appertaining to or forming part of the record therein, excepting the motion and petition for change of venue and affidavits in support thereof and thereto attached and the order of judge directing the change of venue, of which copies thereof are set forth as aforesaid.

Witness my hand as clerk of said court, and the seal thereof, at Cañon City, in said county, this 2d day of June, A. D. 1873.

{ DISTRICT COURT SEAL FREMONT COUNTY, COLORADO. }

GEO. A. BUTE, *Clerk.*
Per JOHN WILSON, *Deputy.*

Attached to the above transcript, marked "A," is a certain summons; which said summons, with sheriff's return and the clerk's filing thereon, is in words and figures following:

TERRITORY OF COLORADO,
Fremont County, ss:

The people of the Territory of Colorado to the sheriff of Arapahoe County, greeting:

We command you to summons George C. Beckwith, if he shall be found in your county, personally to be and appear before the district court of said Fremont County, to be holden at the court-house in
21 Cañon City, in said county, on the twenty-seventh day of May, A. D. 1873, to answer unto Chalmers W. Talbot in a plea of assumpsit, to the damage of said plaintiff, as he says, in the sum of ten thousand ($10,000) dollars & cents; and have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness George A. Bute, clerk of our court, and the seal thereof, at Cañon City aforesaid, this twelfth day of May, A. D. one thousand eight hundred and seventy-three.

{ FREMONT COUNTY SEAL DISTRICT COURT, COLORADO. }

GEORGE A. BUTE,
By JOHN WILSON,
Deputy.

Sheriff's return endorsed thereon is as follows, to wit:

TERRITORY OF COLORADO,
Arapahoe County:

May fifteenth, A. D. one thousand eight hundred and seventy-three. I have duly served the within by reading the same to the within-named George C. Beckwith, as I am therein commanded.

D. S. COOK, *Sheriff.*

Clerk's filing endorsed thereon is as follows, to wit:

Filed in said court this nineteenth day of May, one thousand eight hundred and seventy-three.

JOHN WILSON,
Deputy Clerk.

22 Also attached to said transcript, marked "B," is a certain declaration; which said declaration, with the clerk's filing thereon, is in words and figures following, to wit:

In the district court of the third judicial district of Colorado in and for the county of Fremont.—To the May term, one thousand eight hundred and seventy-three.

CHALMERS W. TALBOT
vs.
GEORGE C. BECKWITH. } Assumpsit. Dam., $10,000.

The plaintiff, Chalmers W. Talbot, complains of the defendant, George C. Beckwith, in a plea of assumpsit; for that, whereas, heretofore, to wit, on the first day of December, A. D. one thousand eight hundred and seventy, at the county of Fremont, and Territory of Colorado, the said plaintiff and one Elton T. Beckwith and Edwin F. Beckwith, on the one part, and the said defendant, on the other part, made an agreement whereby the said plaintiff and the said Elton S. and Edwin F. Beckwith undertook and promised the said defendant to take of and from him a large lot of cattle, to wit, twenty-eight hundred
23 and fifty head, of the goods and chattels of the said defendant, to herd and care for at the county aforesaid, from the day aforesaid until the fifth day of December, A. D. one thousand eight hundred and seventy-two.

And in consideration of the said promises and undertakings of plaintiff and the said Elton T. and Edwin F. Beckwith, the said defendant then and there undertook and *and* promised plaintiff and Elton T. and Edwin F. Beckwith that he would deliver to them at the county aforesaid the said cattle, and that on or before the expiration of their said agreement, to wit, the fifth day of December, A. D. one thousand eight hundred and seventy-two, would sell the said cattle and the increase thereof at the most advantageous terms, and from the whole sum so realized by said sales would retain the sum of thirty-six thousand six hundred and eighty-one dollars and sixty cents, and pay them for their services in and about the herding of said cattle one-half of the balance.

And plaintiff avers that in pursuance of the aforesaid agreement the said defendant did, on the first day of December, A. D. one thousand eight hundred and seventy, at the county aforesaid, deliver to
24 plaintiff, and the said Elton S. and Edwin F. Beckwith did then and there receive, and from that day, to wit, the first day of December, A. D. one thousand eight hundred and seventy, to the fifteenth day of December, A. D. one thousand eight hundred and seventy-two, did faithfully and diligently herd and look after and care for said cattle, and upon the sixth day of December, A. D. one thousand eight hundred and seventy-two, at the request of the defendant, they delivered and surrendered the possession of said cattle to said defendant, who then and there took possession of the same, and has from thence hitherto possessed and controlled the said cattle, by means whereof the said defendant then and there became and was bound to sell said cattle to the best advantage, and to pay the plaintiff and the said Elton T. and Edwin F. Beckwith the one-half of the money arising from the sale thereof after retaining the aforesaid sum of thirty-six thousand six hundred and eighty-one dollars and sixty cents.

And plaintiff avers that afterwards, to wit, on the first day of
25 January, A. D. one thousand eight hundred and seventy-three, at the county of Fremont aforesaid, the said defendant settled with, paid, and wholly satisfied the said Elton T. and Edwin F. Beckwith for their care, labor, and services in and about the herding of said cattle

under the agreement aforesaid, and there is now nothing remaining due to the said Elton T. and Edwin F. Beckwith from the said defendant under the said agreement, of all which premises the said defendant then and there had notice.

Yet the said defendant, not regarding his said promise and undertaking, but contriving and intending to deceive, cheat, and defraud plaintiff in this behalf, hath not, (though often requested so to do by plaintiff,) as yet sold said cattle, nor paid plaintiff the aforesaid sum of money, or any part thereof, but hath hitherto wholly neglected and refused, and still doth neglect and refuse, to either sell said cattle or to pay plaintiff.

And for that, whereas, heretofore, to wit, on the first day of December, A. D. one thousand eight hundred and seventy, at the county of Fremont, and Territory of Colorado, in consideration that the
26 said plaintiff, and one Elton S. and Edwin F. Beckwith, would herd and take care of, for the said defendant, a large herd of cattle, to wit, twenty-eight hundred and fifty head, from the day aforesaid to the fifth day of December, one thousand eight hundred and seventy-two, he, the said defendant, then and there, to wit, on the first day of December aforesaid, at the county aforesaid, undertook and faithfully promised then to sell, on or before the fifth day of December, A. D. one thousand eight hundred and seventy-two, the said cattle, and the increase thereof, and, after deducting from the amount realized by such sale the sum of thirty-six thousand six hundred and eighty-one dollars and sixty cents, to pay them, the said plaintiffs, and the said Elton T. and Edwin F. Beckwith, one-half of the balance of said amount of money, and that in default of such sale on or before the said fifth day of December, A. D. one thousand eight hundred and seventy-two, then, and in that case, he would pay to them the one-half of the value of said cattle, after deducting therefrom the aforesaid sum of thirty-six thousand six hundred and eighty-one dollars and sixty cents.

27 And the plaintiff avers that he and the said Elton T. and Edwin F. Beckwith did faithfully and diligently herd and care for said cattle, at the county aforesaid, from the said first day of December, A. D. one thousand eight hundred and seventy, to fifth day of December, A. D. one thousand eight hundred and seventy-two; and upon the fifth day of December, A. D. one thousand eight hundred and seventy-two, at the request of defendant, they surrendered and delivered the same to defendant, by reason of which the said defendant then and there became and was bound to sell the said cattle, to wit, on the said fifth day of December, A. D. one thousand eight hundred and seventy-two, and to pay the said plaintiff and the said Elton T. and Edwin F. Beckwith the one-half of the amount of money produced by said sale after making the deduction of thirty-six thousand six hundred and eighty-one dollars and sixty cents, or to pay them one-half of the value of said cattle after making the aforesaid deduction.

And plaintiff avers that afterwards, to wit, on the first day of January, A. D. one thousand eight hundred and seventy-three,
28 the said defendant did wholly pay and satisfy the said Elton T. and Edwin F. Beckwith for their proportion of the sum due plaintiff and them for their labor and service in and about the care and herding of said cattle, under their aforesaid agreement with defendant in this behalf, to wit, two-thirds of the one-half of the value of said cattle, after making the deduction aforesaid; and plaintiff avers that the said cattle, on the fifth day of December, A. D. one thousand eight hundred and seventy-two, were well and reasonably worth the sum of one

hundred thousand dollars, of all which premises the said defendant then and there had notice.

Yet the said defendant, not regarding his said promises and undertakings, but contriving and intending to cheat and defraud the said plaintiff in this behalf, hath not, (though often requested so to do,) as yet sold said cattle and paid plaintiff the aforesaid proportion of the money arising from such sale, due him as aforesaid, nor any part thereof; nor has he paid plaintiff the one-third of one-half of the value of said cattle on the fifth day of December, A. D. one thousand
29 eight hundred and seventy-two, less the deduction aforesaid, or any part thereof; but hath hitherto wholly neglected and refused, and still doth neglect and refuse, so to do, to the damage of the said plaintiff of ten thousand dollars.

And for that heretofore, to wit, on the first day of October, A. D. one thousand eight hundred and seventy, at the county of Fremont, and Territory of Colorado, the said defendant, George C. Beckwith, then and there being the owner of a large number of neat cattle, and then and there being desirous of having the same herded and cared for at the county aforesaid, employed the said plaintiff and one Elton T. and Edwin F. Beckwith to herd and care for the same for a long space of time, to wit, from the day last aforesaid until the fifth day of December, A. D. one thousand eight hundred and seventy-two, and promised to pay the said plaintiff and the said Elton T. and Edwin F. Beckwith, on the said fifth day of December, A. D. one thousand eight hundred and seventy-two, at the county aforesaid, a sum of money equal
30 to one-half of the fair value of the said cattle and the increase thereof, on the said fifth day of December, A. D. one thousand eight hundred and seventy-two, after deducting from said value the sum of thirty-six thousand six hundred and eighty-one dollars and sixty cents. And by said agreement defendant was authorized to sell at any time as many of the steers in said herd of cattle as he profitably could, and apply the proceeds of said sale to the diminution of said sum of thirty-six thousand six hundred and eighty-one dollars and sixty cents.

And the plaintiff avers that he and the said Elton T. and Edwin F. Beckwith were each and severally entitled to, and were to be paid, severally, by said defendant, one-third of the one-half of the value of said cattle on the day aforesaid after making the deduction aforesaid.

And the said plaintiff avers that he and the said Elton T. and Edwin F. Beckwith, on the first day of October, aforesaid, at the county aforesaid, entered into the employment of the said defendant, as aforesaid, and so continued from the said 1st day of October, A. D. 1870, to the 3d day of December, A. D. 1872.

31 And plaintiff avers that on the said fifth day of December, A. D. one thousand eight hundred and seventy-two, the said cattle were well and reasonably worth one hundred thousand dollars, to wit, at the county of Fremont, by reason of which the said plaintiff became and was entitled to have and demand of and from the said defendant the sum of ten thousand dollars; of all which the said defendant then and there had notice.

Yet the said defendant, disregarding his promise and undertaking and intending to cheat and defraud plaintiff, hath not, although often requested so to do, as yet paid the said plaintiff the said sum of ten thousand dollars, or any part thereof, but hath wholly neglected and refused and still doth neglect and refuse so to do, to the damage of the said plaintiff of ten thousand dollars.

And for that, whereas, heretofore, to wit, on the first day of April,

one thousand eight hundred and seventy-three, at the county of Fremont and Territory of Colorado, the said defendant, George C. Beckwith, was indebted to the said plaintiff in the further sum of ten thou-
sand dollars for the wages of the plaintiff before that time, and
32 then due and payable for the work and labor, care and diligence done, performed, and bestowed in and about the business of the said defendant, and for the said defendant, and at his aforesaid instance and request, and being so indebted he, the said defendant, in consideration thereof, afterwards, to wit, on the first day of May, A. D. one thousand eight hundred and seventy-three, at the county aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said last-mentioned sum of money when he, the said defendant, should be thereto afterwards requested.

Yet, though often requested so to do, the said defendant hath not paid plaintiff the said sum of money, or any part thereof, to the damage of the said plaintiff of ten thousand dollars; and therefore he brings suit.

THO'S MACON,
Att'y for Pl'ff.

Geo. C. Beckwith to Chalmers W. Talbot, D'r.

To services in herding cattle from the first of October, one thou-
33 sand eight hundred and seventy, to the fifth day of December, A. D. one thousand eight hundred and seventy-two, ten thousand dollars.

Endorsed on the above declaration is the clerk's filing; which said filing is in words and figures following, to wit: One thousand eight hundred and seventy-three, May sixteenth. Filed. Geo. A. Bute, clerk, per John Wilson, deputy.

Also attached to said transcript, marked "C," "D," and "E," are three subpœnas for witnesses, which, as forming no part of the record in this cause, have been omitted.

Also attached to said transcript, marked "F," is a certain demurrer of the said defendant to the said plaintiff's declaration; which said demurrer, with the clerk's filing endorsed thereon, is in words and figures following, to wit:

TERRITORY OF COLORADO,
County of Fremont, ss:

In the district court of the third judicial district of Colorado Ter
34 ritory, in and for the county of Fremont, to the May term, A. D. 1873.

CHALMERS W. TALBOT } Demurrer.
vs.
GEORGE C. BECKWITH. }

And the defendant, by E. Bass and George A. Hinsdale, his attorneys, comes and defends the wrong and injury, when, etc., and says that the said declaration and each and every count thereof, and the matters therein contained, in manner and form as the same are therein stated and set forth, are not sufficient in law for the plaintiff to have or maintain his aforesaid action thereof against the defendant, and he, the defendant, is not bound by law to answer the same.

Wherefore he prays judgment, etc.

And the defendant shows to the court here the following special causes of demurrer to the said declaration, that is to say—

1st. That the said first count of said declaration sets up an agreement between the plaintiff and Edwin F. Beckwith and Elton T. Beckwith, on the one part, and George C. Beckwith, the defendant, on the
35 other part, without alleging whether the said pretended agreement was verbal or in writing, or was or was not an agreement under seal.

Second. The said first count does not state the value of the said cattle at the time of the pretended redelivery of the same to the defendant, on the sixth day of December, A. D. one thousand eight hundred and seventy-two, or that they were of a greater value than the said sum of thirty-six thousand six hundred and eighty-one dollars and sixty cents.

Third. The said first count does not set forth the facts which constituted a breach of any of the conditions of the said pretended agreement beween the plaintiff and Edwin F. Beckwith and Elton T. Beckwith on the one part, and George C. Beckwith on the other.

Fourth. The said first count does not set forth the facts which constitute a performance on the part of the plaintiff of his pretended agreement with the defendant, in that it does not state that the increase of the said cattle were ever redelivered to the defendant.

Fifth. The said first count sets up facts which show that the
36 said Edwin F. Beckwith and Elton T. Beckwith should be joined in the suit as parties plaintiff.

Sixth. The said first count fails to show the number or value of the cattle which it is therein alleged were redelivered to the defendant on the sixth day of December, A. D. one thousand eight hundred and seventy-two.

Seventh. The said first count sets up as the basis of the said plaintiffs' cause of action an executory contract.

Eighth. The second count of the said declaration sets forth an agreement by and between the said plaintiff, Edwin F. Beckwith and Elton T. Beckwith on the one part, and George C. Beckwith, the defendant, of the other part, without averring whether the said pretended agreement was verbal or in writing, or was or was not under seal.

Eighth. The said second count is inconsistent and contradictory.

Ninth. The said second count sets forth a pretended agreement between the plaintiff', Edwin F. Beckwith and Elton T. Beckwith, on the one part, and the defendant, on the other, whereby it is alleged that the defendant agreed and promised to pay the plaintiff and Edwin F. Beckwith and Elton T. Beckwith one-half the value of a certain lot of
37 cattle after deducting the sum of thirty-six thousand six hundred and eighty-one dollars and sixty cents, without alleging a promise to pay the same in any certain proportion to each of them.

Tenth. The said second count sets up facts which show that the said Edwin F. Beckwith and Elton T. Beckwith should be joined as parties plaintiff in this cause.

Eleventh. The said second count does not set up sufficient facts to show any breach of the said agreement by the defendant.

Twelfth. The said second count does not set forth facts enough to show that the said plaintiff has performed his promises as set forth in said agreement.

Thirteenth. The plaintiff in the second count does not allege that he surrendered and delivered said cattle to the defendant in accordance with the agreement.

Fourteenth. The third count of said declaration is defective in that it

does not set forth the number and value of the cattle alleged to have been herded and kept by plaintiff, for which it is alleged he was entitled to be paid by the defendant a share of the proceeds.

Fifteenth. The said third count does not set forth an undertaking or promise on the part of the defendant to pay the plaintiff a
38 divided share of the same alleged to have been made payable to plaintiff, Edwin F. Beckwith and Elton T. Beckwith, jointly, nor does it set forth the facts from what such promise may or can be deduced.

Sixteenth. The said third count is conflicting and contradictory in setting forth the said alleged promise and undertaking of the defendant.

Seventeenth. The said third count does not show the number of the cattle alleged to be worth one hundred thousand , nor does it show and set forth any facts showing the nature of the plaintiff's claim.

Eighteenth. The said third count sets up facts showing that Edwin F. Beckwith and Elton T. Beckwith should be joined as parties plaintiff in the said suit.

Nineteenth. The said counts of the said declaration, and each and every of them, are in other respects uncertain, informal, and insufficient.

By E. BASS and GEORGE A. HINSDALE,
Attorneys for Defendant.

(Endorsed on the above demurrer is the clerk's filing; which said filing is in words and figures following:) Eighteen hundred and seventy-
39 three, May twenty-ninth. Filed. George A. Bute, clerk, per John Wilson, deputy.

Also attached to the aforesaid transcript, and marked "G," is a certain amended declaration with clerk's endorsement thereon; which said amended declaration, with clerk's filing thereon, is in words and figures following, to wit:

In the district court of the third judicial district of Colorado, in and for the county of Fremont, at the May term, A. D. 1873.

CHALMERS W. TALBOT } Assumpsit. Dam. $10,000.
vs.
GEORGE C. BECKWITH. }

Chalmers W. Talbot, by leave of the court first had and obtained, now comes and files this his amended declaration herein, and complains of George C. Beckwith, the defendant, in a plea of assumpsit, for that, whereas, heretofore, to wit, on the first day of December, A. D. one thousand eight hundred and seventy, at the county of Fremont and Territory of Colorado, the said plaintiff and one Elton T. Beck-
40 with and Edwin F. Beckwith, on the one part, and the said George C. Beckwith, the defendant, on the other part, made an agreement whereby the said plaintiff and the said Elton T. and Edwin F. Beckwith undertook and promised the said defendant to take of and from him a large herd of cattle, to wit, about twenty-eight hundred and fifty head, of the property of said defendant, to herd and care for the same, and the increase thereof, at the county aforesaid, from the day aforesaid until the fifth day of December, A. D. one thousand eight hundred and seventy-two.

And in consideration of the said promises and undertakings of the said plaintiff and the said Elton T. and Edwin F. Beckwith, the said defendant, then and there, undertook and promised them to deliver to them, at the county aforesaid, the aforesaid number of cattle, and that,

on or before the said fifth day of December, A. D. one thousand eight hundred and seventy-two, he would sell the said cattle, and the increase thereof, at the most advantageous terms, and from the whole amount of money produced by such sale would retain the sum of thirty-six thousand six hundred and eighty-one dollars and sixty cents and pay
41 them for their said service in and about the said cattle one-half of the balance in equal proportions.

And plaintiff avers that in pursuance of the aforesaid agreement the said defendant did on the first day of December, A. D. one thousand eight hundred and seventy, deliver to the said plaintiff and the said Elton T. and Edwin F. Beckwith twenty-eight hundred and fifty head of cattle at the said county; and the said plaintiff and the said Elton T. and Edwin F. Beckwith did then and there receive the same, and from that day to the fifth day of December, A. D. one thousand eight hundred and seventy-two, did faithfully and diligently herd and care for said cattle and the increase thereof; and upon the sixth day of December, A. D. one thousand eight hundred and seventy-two, at the county aforesaid and at the request of the defendant, they delivered and surrendered the said cattle and their increase to the said defendant, who then and there took possession of the same, and from thence hitherto hath possessed and controlled the same.

By reason whereof the said defendant then and there became and was bound to sell the said cattle and their increase on or before
42 the fifth day of December, A. D. one thousand eight hundred and seventy-two, and after deducting and retaining the said sum of thirty-six thousand six hundred and eighty-one dollars and sixty cents from the sum produced by said sale, to pay plaintiff and the said Elton T. and Edwin F. Beckwith one-half the balance in equal proportions.

And plaintiff avers that afterwards, to wit, on the first day of January, A. D. one thousand eight hundred and seventy-three, the said defendant settled with, paid, and wholly satisfied the said Elton T. and Edwin F. Beckwith for their labor and service in and about the said cattle and their increase under said agreement, to wit: two-thirds of one-half of the reasonable value of said cattle and their increase, on the said fifth day of December, A. D. one thousand eight hundred and seventy-two, after making the deduction aforesaid; and plaintiff avers that the said cattle and the increase thereof could have been sold by defendant on the fifth day of December, A. D. one thousand eight hundred and seventy-two, for the sum of one hundred thousand dollars.

Of all which premises the defendant then and there had notice; yet the said defendant, not regarding his premises and undertakings
43 in this behalf, did not sell said cattle and the increase thereof on the fifth day of December, A. D. one thousand eight hundred and seventy-two, and pay plaintiff one-third of one-half of the reasonable value of said cattle on the fifth day of December, A. D. one thousand eight hundred and seventy-two, less the deduction aforesaid, or any part thereof, nor has he yet sold said cattle or paid plaintiff the one-third of one-half of the reasonable value of the same less the aforesaid deduction, or any part thereof, though often requested so to do, to the damage of the plaintiff of ten thousand dollars.

And for that heretofore, to wit, on the first day of October, A. D. one thousand eight hundred and seventy, at the county of Fremont and Territory of Colorado, the said defendant, George C. Beckwith, then and there being the owner of a large number of neat-cattle, to wit, twenty-eight hundred and fifty head, and then and there being desirous of having the same and the increase thereof herded and cared for at the

county aforesaid, employed the said plaintiff and one Elton T. and Edwin F. Beckwith to herd and care for the same for a long space of time, to wit, from the day last aforesaid to the fifth day of December, A.
44 D. one thousand eight hundred and seventy-two, and for such service and labor promised to pay them in equal proportions on the fifth day of December, A. D. one thousand eight hundred and seventy-two, at the county aforesaid, a sum of money equal to one-half of the fair value of said cattle and the increase thereof, on the said fifth day of December, A. D. one thousand eight hundred and seventy-two, after deducting from said value the sum of thirty-six thousand six hundred and eighty-one dollars and sixty cents, and by said agreement said defendant was authorized to sell at any time as many of the steers in said herd of cattle as he profitably could and apply the proceeds of such sale to the diminution of the said sum of thirty-six thousand six hundred and eighty-one dollars and sixty cents.

And plaintiff avers that he and the said Elton T. and Edwin F. Beckwith, on the first day of October aforesaid, at the county aforesaid, entered into the employment of the said defendant as aforesaid, and so continued from the said first day of October, A. D. one thousand eight hundred and seventy, to the fifth day of December, A. D. one
45 thousand eight hundred and seventy-two; and the plaintiff avers that on the said fifth day of December, A. D. one thousand eight hundred and seventy-two, the said cattle and the increase thereof were well and reasonably worth one hundred thousand dollars, to wit, at the county of Fremont aforesaid, by reason of which the said plaintiff became and was entitled to have and demand of and from the said defendant the sum of ten thousand dollars.

Of all which premises the said defendant then and there had notice. Yet the said defendant, disregarding his said promises and undertakings, hath not, though often requested so to do, as yet paid the said plaintiff the said sum of two thousand dollars, or any part thereof, but has wholly neglected and refused, and still doth neglect and refuse, so to do, to the damage of the said plaintiff of ten thousand dollars; and therefore he brings his suit.

By THO'S MACON, *His Att'y.*

(Endorsed on the above amended declaration is the clerk's filing; which said filing is in words and figures following:) One thousand eight hundred and seventy-three, May thirty-first. Filed. Geo. A. Bute, clerk, per Jno. Wilson, deputy.

46 Also attached to the said transcript, marked "H," is a certain affidavit; which said affidavit, with clerk's filing thereon, is in words and figures following, to wit:

TERRITORY OF COLORADO,
County of Fremont, ss:

I, May, first being duly sworn, upon his oath states: that I am a resident of Fremont County; that I have been a resident of the said county for the past twelve years; that I am acquainted with most of the inhabitants of Wet Mountain Valley, and with their sentiments, opinions, and feelings toward the said George C. Beckwith; and whilst there are some hostile and embittered towards him, yet a majority of the people of the said Fremont County have no prejudice or hostility towards the said George C. Beckwith. And I do further state that there has not been, at any time since my residence in the said county, any meetings in said Wet Mountain Valley or said Fremont County, of

the citizens thereof, for any purpose hostile or inimical to the person or property of the said George C. Beckwith; that there has not been, as far as I know or to my knowledge or by any information which
47 has come to me, any mob arranged to do violence to said Beckwith or his property in said Wet Mountain Valley.

And further deponent saith not.

WILLIAM H. MAY.

(The clerk's filing endorsed on the above affidavit is as follows:) One thousand eight hundred and seventy-three, May thirty-first. Filed. Geo. A. Bute, clerk, per John Wilson, deputy.

Also attached to the said transcript, marked "I," is a certain affidavit; which said affidavit, with clerk's filing endorsed thereon, is in words and figures following:

TERRITORY OF COLORADO,
County of Fremont, ss:

A. Rudd, first being duly sworn, upon his oath states that: I am a resident of Cañon City, Colorado Territory, Fremont County; that I have been such for the space of three years past; that I am acquainted with George C. Beckwith, and also with most of the inhabitants of said Fremont County; that while I believe there are those that are hostile towards the said George C. Beckwith, yet I believe there are a great many of the people of the said county of Fremont who are not
48 prejudiced or hostile towards the said George C. Beckwith. And I do further state, to the best of my knowledge and belief, that there has not been, at any time since my residence in the said county, any organized mob or any meeting held hostile towards the said George C. Beckwith or his property.

And further this deponent saith not.

A. RUDD.

The within affidavit was subscribed and sworn before me this 30 of May, 1873.

GEO. A. BUTE,
Clerk District Court,
Per JOHN WILSON, *Deputy.*

(The clerk's filing endorsed on the above affidavit is as follows:) One thousand eight hundred and seventy-three, May thirty-first. Filed. George A. Bute, clerk, per John Wilson, deputy.

Also attached to the said transcript, marked "J," is a certain affidavit; which said affidavit, with clerk's filing endorsed thereon, is in words and figures following, to wit:

TERRITORY OF COLORADO,
County of Fremont, ss:

49 James Smith, first being duly sworn, upon his oath states that he now resides, and during the three years last past has resided, in Wet Mountain Valley, in said county; that he is acquainted with almost every man in said Wet Mountain Valley; that he meets and converses with them frequently on all subjects of any interest to them or to himself; that he is also acquainted with George C. Beckwith, and with feelings and sentiments of the inhabitants of said Wet Mountain Valley towards the said Beckwith.

That it is true that among a portion of the inhabitants of said section there is a strong hostility to the said Beckwith, but that from his acquaintance with said people he believes a large majority of them are indifferent towards him.

That I have not seen or heard of any meeting of the people of the said Wet Mountain Valley, in which it was intended or proposed to do any violence to the property or person of the said Beckwith, or in which his character or business was discussed.

JAMES N. SMITH.

50 The within affidavit was subscribed and sworn to before me this 30th day of May, one thousand eight hundred and seventy-three.

GEORGE A. BUTE,
Clerk District Court,
Per JOHN WILSON, *Deputy.*

(The clerk's filing endorsed on the above affidavit is in words and figures following, to wit:) One thousand eight hundred and seventy-three, May thirty-first. Filed. George A. Bute, clerk, per John Wilson, deputy.

Also attached to the said transcript, marked "K," is a certain affidavit; which said affidavit, with clerk's filing endorsed thereon, is in words and figures following, to wit:

TERRITORY OF COLORADO,
County of Fremont, ss:

I, B. F. Allen, being first duly sworn, upon his oath states that: I am a resident of Cañon City, Fremont County, and Colorado Territory; that I have been a resident of said county for the space of about
51 three past; that I am acquainted with George C. Beckwith and also with the most of the inhabitants of the said Fremont County and with the sentiments and opinions of many of the people of the said county towards the said George C. Beckwith; that while many of them are hostile towards the said George C. Beckwith, yet I believe the said George C. Beckwith can obtain justice before a jury in case tried in the said Fremont County.

And I further state that I know of no meetings held in said county, or of any mob being organized to harm either the said George C. Beckwith or his property. And further this deponent saith not.

B. F. ALLEN.

Subscribed and sworn to before me this thirty-first May, one thousand eight hundred and seventy-three.

GEORGE A. BUTE,
Clerk District Court,
Per JOHN WILSON, *Deputy.*

(The clerk's filing endorsed on the above affidavit is in words
52 and figures following, to wit:) One thousand eight hundred and seventy-three, May thirty-first. Filed. George A. Bute, clerk, per John Wilson, deputy.

Also attached to the said transcript, marked "M," is a certain affidavit; which said affidavit, with clerk's filing thereon, is in words and figures following, to wit:

TERRITORY OF COLORADO,
County of Fremont, ss:

I, Henry Ripley, first being duly sworn, upon his oath states that: I am a resident of Cañon City, Colorado Ter., Fremont County; that I have been such a resident of said county for the space of three years past;
and also with most the inhabitants of the county, and with the feelings and sentiments of many of the people of the said county towards the said George C. Beckwith; and while there are some who are embittered and hostile towards him, yet a majority of the people
53 of said county are not prejudiced or hostile towards him; and I do further state that there has not been, to the best of my knowledge and belief, since my residence in the said county, any meetings in the said county, by the citizens thereof, for any purpose hostile or inimical to the person or property of said George C. Beckwith.

That there has not been, either to affiant's knowledge or by any information which has come to him, any mob organized to do violence to said George C. Beckwith or to his property in said Wet Mountain Valley.

And further this deponent saith not.

HENRY RIPLEY.

The within affidavit was subscribed and sworn to before me this thirtieth May, one thousand eight hundred and seventy-three.

GEORGE A. BUTE,
Clerk District Court.
Per JOHN WILSON, *Deputy.*

(The clerk's filing endorsed on the foregoing affidavit is in words and figures following, to wit:) One thousand eight hundred
54 and seventy-three, May thirty-first. Filed. George A. Bute, clerk, per John Wilson, deputy.

Also attached to the said transcript is a certain affidavit, marked "N;" which said affidavit, with clerk's filing endorsed thereon, is in words and figures following, to wit:

TERRITORY OF COLORADO,
County of Fremont, ss:

William Ripley, first being duly sworn, upon his oath states, that: I am a resident of Cañon City, in said Fremont County; that I have been a resident of said county of Fremont for upwards of two years, and also that I know the opinions and feelings of many of the inhabitants of said Fremont County towards George C. Beckwith; and while there are some who are hostile towards him, yet there are a great many who have no prejudice or hostile feelings towards him. And I do further state that there has not been, as far as my knowledge or information
55 is concerned, any meetings held or mob organized for the purpose of doing harm either to the person or property of the said George C. Beckwith.

And further this deponent saith not.

WILLIAM RIPLEY.

Subscribed and sworn to before me this thirtieth day of May, one thousand eight hundred and seventy-three.

GEORGE A. BUTE,
Clerk District Court.
Per JOHN WILSON, *Deputy.*

(The clerk's filing endorsed on the foregoing affidavit is in words and figures following, to wit:) One thousand eight hundred and seventy-three, May thirty-first. Filed. George A. Bute, clerk, per John Wilson, deputy.

Also attached to the said transcript is a certain affidavit, marked "O;" which said affidavit, with clerk's endorsement thereon, is in words and figures following, to wit:

TERRITORY OF COLORADO,
County of Fremont, ss:

56 I, Ira Lucas, first being duly sworn, upon my oath state, that: I now reside, and have for the past three years resided, in Cañon City, in Fremont County, Colorado; that he is well acquainted in the said county; that while there are some who are embittered and hostile to the said George C. Beckwith, yet there are a majority of the people of said Fremont County who have no prejudice or hostility towards him. And I further state that there has not been, at any time since my residence in said county, any meeting in said county for any purpose hostile or inimical to the person or property of said George C. Beckwith; that there has not been to affiant's knowledge, or by any information which has come to him, any mob organized to do violence to said Beckwith or to his property in said Wet Mountain Valley.

And further this deponent saith not.

IRA H. LUCAS.

The within affidavit was subscribed and sworn to before me the thirtieth day of May, one thousand eight hundred and seventy-three.

57 GEORGE A. BUTE,
Clerk District Court.
Per JOHN WILSON, *Deputy.*

(The clerk's filing endorsed on the foregoing affidavit is in words and figures following, to wit:) One thousand eight hundred and seventy-three, May thirty-first. Filed. George A. Bute, clerk, per John Wilson, deputy.

Also attached to the said transcript, "P," is a certain affidavit; which said affidavit, with clerk's filing endorsed thereon, is in words and figures following, to wit:

TERRITORY OF COLORADO,
County of Fremont, ss:

J. F. Lewis, first being duly sworn, upon his oath states, that: I am a resident of Cañon City, Fremont County, Colorado Ter. That have been such a resident for the past nine months. That I am acquainted with George C. Beckwith, and also with many of the inhabitants of said county, and with their opinions and feelings towards the said
58 George C. Beckwith, and while there are some who are embittered and hostile to him, yet I believe that the said George C. Beckwith could obtain justice if he were to have a case tried in the said Fremont County. And he further states that there has not been, to his knowledge, since his residence in the said county, any meeting or riot organized for the purpose of harming the said George C. Beckwith or his property. He further states that he met Francis Hamblett in Wet Mountain Valley this week; that the said Francis Hamblett

stated to the deponent that he, the said Hamblett, was a witness on a case of People vs. Beckwith. That he did not know anything about the case. That he did not know much about (the said) George C. Beckwith, but from what he had heard about the said George C. Beckwith he was of the opinion that (the said) George C. Beckwith was a damned old thief.

And further this deponent saith not.

J. F. LEWIS.

Subscribed and sworn to before me this thirtieth day of May,
59 one thousand eight hundred and seventy-three.

GEORGE A. BUTE,
Clerk District Court.
Per JOHN WILSON, *Deputy.*

(The clerk's filing endorsed on the above affidavit is in words and figures following, to wit:) One thousand eight hundred and seventy-three. Filed. George A. Bute, clerk, per John Wilson, deputy.

And on the fifth day of June, in the year one thousand eight hundred and seventy-three, the same being one of the days of the said June term, A. D. one thousand eight hundred and seventy-three, of said court, the following, among other proceedings, were had, to wit:

CHALMERS W. TALBOT *vs.* GEORGE C. BECKWITH. } Assumpsit.

Now, on this day comes the said plaintiff, by his attorney, Tho's Macon, and the said defendant, by his attorneys, H. C. Thatcher, Geo. A. Hinsdale, and G. Q. Richmond, also comes; and on motion of the
60 said plaintiff it is ordered by the court that the said defendant plead to the said plaintiff's amended declaration herein by incoming of court on the sixth instant.

And afterwards, to wit, on the sixth day of June, A. D. one thousand eight hundred and seventy-three, the defendant appeared, by his attorneys, G. A. Hinsdale, H. C. Thatcher, and G. Q. Richmond, and filed a plea in words and figures following, to wit:

TERRITORY OF COLORADO,
County of Pueblo, ss:

In the district court of the third judicial district of Colorado Territory, within and for the county of Pueblo, of the June term, A. D. one thousand eight hundred and seventy-three.

TALBOT *vs.* BECKWITH. } Assumpsit.

And the defendant, by his attorneys, G. A. Hinsdale, H. C. Thatcher, and G. Q. Richmond, comes and defends the wrong and injuries,
61 etc., and says that he did not undertake or promise in manner and form as the plaintiff has in his declaration thereof complained against him; and of this he puts himself upon the country, etc.

By G. A. HINSDALE,
H. C. THATCHER, AND
G. Q. RICHMOND,
His Attorneys.

And the said plaintiff doth the like.

By THO'S MACON AND
WILBUR F. STONE.

And afterwards, to wit, on the tenth day of June, A. D. one thousand eight hundred and seventy-three, the same being one of the days of the said June term, A. D. one thousand eight hundred and seventy-three, of the said court, the following, among other proceedings, were had and done and entered of record, to wit:

CHALMERS W. TALBOT
vs. } Assumpsit.
GEORGE C. BECKWITH.

Now, on this day, comes the said plaintiff, by his attorneys, Thomas Macon, G. W. Chamberlain, and W. F. Stone, and the said defendant, by his attorneys, H. C. Thatcher, G. Q. Richmond, and Geo. A.
62 Hinsdale, also comes, and this cause comes on for trial; and thereupon comes a jury, twelve good and lawful men, to wit, C. J. Reed, John Williams, M. McCarty, Geo. W. Hepburn, M. D. Craws, George Overturf, James Dewees, J. E. Smith, William Bingel, M. Bergerman, James Bruce, C. E. Olin, who, being duly empanneled and sworn to well and truly try the issues joined in this cause and a true verdict render, after hearing part of the evidence of witnesses on behalf of plaintiff, certain causes moving as well the court as the plaintiff and the said defendant, Geo. W. Hepburn, one of the jurors of the jury aforesaid is withdrawn from the pannel thereof, and the rest of the jurors of the jury aforesaid are altogether discharged from giving any verdict of and upon the premises within mentioned.

And it is considered by the court that the said defendant recover of and from the said plaintiff his costs in this trial expended, to be taxed, and that he have execution therefor; and that the said plaintiff pay his costs in this trial expended.

63 And leave is given the said plaintiff to amend his declaration herein.

And afterwards, to wit, on the twelfth day of June, A. D. one thousand eight hundred and seventy-three, the plaintiff, by his attorneys, Thos. Macon and William F. Stone, filed in said clerk's office a certain amended declaration; which is in words and figures as follows, to wit:

TERRITORY OF COLORADO,
County of Pueblo, ss:

In the district court of the third judicial district, sitting within and for the county of Pueblo. To the June term, one thousand eight hundred and seventy-three.

CHALMERS W. TALBOT
vs. Assumpsit. Dam., $18,000.
GEORGE C. BECKWITH.

The plaintiff, Chalmers W. Talbot, by leave of the court first had and obtained, now comes and files this his amended declaration, and complains of the defendant, George C. Beckwith, of a plea of assumpsit, for that heretofore, to wit, on the 7 day of October,
64 A. D. one thousand eight hundred and seventy, at the county of Fremont, to wit, at the county of Pueblo and Territory of Colorado, the said plaintiff and one Elton T. and Edwin F. Beckwith, on the one part, and the said defendant, George C. Beckwith, on the other part, made an agreement whereby they undertook and promised the

defendant to herd and look after and care for, at the county of Fremont aforesaid, a large herd of cattle, to wit, two thousand two hundred and five, and the increase thereof, from said seventh day of October, A. D. one thousand eight hundred and seventy, to the fifth day of December, A. D. one thousand eight hundred and seventy-two, in consideration whereof the said defendant then and there promised to deliver the aforesaid number of cattle to plaintiff and the said Elton T. and Edwin F. Beckwell, to be herded as aforesaid; and that on the fifth day of December, A. D. one thousand eight hundred and seventy-two, he
65 would sell the said cattle and the increase thereof to the best advantage, and, after retaining from the sum of money produced by such sale the sum of thirty-six thousand six hundred and eighty-one dollars and sixty cents, he would pay to the said plaintiff and the said Elton T. and Edwin F. Beckwith each one-third of the one-half of the balance of said sum; and that in case he, the said defendant, should not sell said cattle and the increase of the same on the said fifth day of December, A. D. one thousand eight hundred and seventy-two, *that* he would pay the plaintiff and the said Elton T. and Edwin F. Beckwith each so much as would be equal to one-third of one-half of the reasonable market-value of said cattle and their increase on the said fifth day of December, A. D. one thousand eight hundred seventy-two, at the county aforesaid, after making the deduction of the aforesaid sum of thirty-six thousand six hundred and eighty-one dollars and sixty cents.

And the plaintiff avers that, in pursuance of the agreement aforesaid,
66 the said defendant did, on the first day of October, A. D. one thousand eight hundred and seventy, at the county aforesaid, deliver to him and the said Elton T. and Edwin F. Beckwith two thousand two hundred and five head of cattle, to be kept and herded as aforesaid; and plaintiff and the said Elton T. and E'win F. Beckwith did then and there receive the same, and from that day to the sixth day of December, A. D. one thousand eight hundred and seventy-two, at the county aforesaid, did faithfully and diligently keep, herd, and care for the said cattle and the increase thereof, and on the sixth day of December, A. D. one thousand eight hundred and seventy-two, at the county aforesaid, did surrender and deliver the said cattle and their increase to defendant.

By reason whereof the same defendant then and there became and was bound to sell the said cattle and their increase to the best advantage, and to pay the said plaintiff and the said Elton T. and Ed-
67 win F. Beckwith each one-third of one-half of the money produced by such sale, after making the deduction aforesaid, or to pay to each of them the one-third of one-half of the reasonable market-value of said cattle and increase, less the deduction aforesaid, or to pay to each of them the one-third of one-half of the reasonable market-value of said cattle and increase, less the deduction aforesaid, on the said fifth day of December, A. D. one thousand eight hundred and seventy-two, at the county aforesaid. And plaintiff avers that, on the fifth day of December, A. D. one thousand eight hundred seventy-two, the said cattle and their increase amounted, in the aggregate, to four thousand five hundred head, and were well and reasonably worth, and could and ought to have been sold by defendant for, ninety-seven thousand dollars.

And plaintiff avers that afterwards, to wit, on the thirte'nth day of December, A. D. one thousand eight hundred and seventy-two,
68 the said defendant settled with, paid, and wholly satisfied the said Elton T. and Edwin F. Beckwith for their labor and service

in and about the said cattle and their increase done and performed under and in pursuance of the agreement aforesaid.

Of all which premises the said defendant then and there had notice. Yet the said defendant, disregarding his promises and undertakings in this behalf, did not, on the said fifth day of December, A. D. one thousand eight hundred and seventy-two, nor at any time since, sell the said cattle and increase, nor hath he paid plaintiff the one-third of one-half of the reasonable market-value of said cattle and increase on the said fifth day of December, A. D. one thousand eight hundred and seventy-two, less the deduction aforesaid, nor any part thereof, although often requested so to do, to the damage of the plaintiff of ten thousand dollars.

69 And for that, heretofore, to wit, on the seventh day of October, A. D. one thousand eight hundred and seventy, at the county of Frémont, to wit, at the county of Pueblo and Territory of Colorado, the said defendant, George C. Beckwith, in consideration that the said plaintiff and one Elton T. and Edwin F. Beckwith would herd and keep for the said defendant a large herd of cattle, to wit, two thousand two hundred and five head, and the increase thereof, from the said seventh day of October, A. D. one thousand eight hundred and seventy, to the fifth day of December, A. D. one thousand eight hundred and seventy-two, he, the said defendant, then and there promised them that he would within a reasonable time after the said fifth day of December, A. D. one thousand eight hundred and seventy-two, sell the said cattle and the increase thereof, and from the amount of money realized by such sale he would retain thirty-six thousand and six hundred and eighty-

70 one dollars and sixty cents, and pay to each of them one-sixth of the balance; and that in default of such sale as aforesaid he would pay to each of them a sum of money equal to one-sixth of the fair market-value of said cattle and their increase, at the expiration of such reasonable time after making the deduction aforesaid.

And the said plaintiff avers that he and the said Elton T. and Edwin F. Beckwith did, from the said seventh day of October, A. D. one thousand eight hundred and seventy, to the sixth day of December, A. D. one thousand eight hundred and seventy-two, faithfully and diligently herd and keep said cattle and the increase thereof, and on the said sixth day of December, A. D. one thousand eight hundred and seventy-two, did deliver and surrender the same to the said defendant, by reason of which the said defendant then and there became and was bound to sell the said cattle and their increase within a reasonable time after

71 said fifth day of December, A. D. one thousand eight hundred and seventy-two, and to pay plaintiff and said Elton T. and Edwin F. Beckwith each one-sixth of the proceeds of such sale, after deducting the sum aforesaid, or to pay said plaintiff and the said Elton T. and Edwin F. Beckwith each one-sixth of the fair market-value of said cattle and their increase, after the expiration of a reasonable time as aforesaid, after retaining the sum aforesaid; and plaintiff avers that afterwards, to wit, on the first day of January, A. D. one thousand eight hundred and seventy-three, the said defendant did settle with, pay, and wholly satisfy the said Elton T. and Edwin F. Beckwith for their labor and service in and about the said cattle and their increase, done and performed in pursuance of the agreement aforesaid.

And plaintiff avers that on the fifth day of December, A. D. one thousand eight hundred and seventy-two, and during a reasonable

72 time thereafter, the said cattle and the increase thereof amounted in number to four thousand five hundred, and were well worth,

and could and ought to have been sold by the defendant during such reasonable time, for ninety-seven thousand dollars; and plaintiff avers that a reasonable time since the fifth day of December, A. D. one thousand eight hundred and seventy-two, hath long since elapsed.

Of all which premises the said defendant then and there had notice. Yet the said defendant, disregarding his promises in this behalf, hath not as yet sold the said cattle and their increase thereof, nor paid the said plaintiff one-sixth of the reasonable value thereof, at the expiration of a reasonable time from the fffth day of December, A. D. one thousand eight hundred and seventy-two, after deducting the sum aforesaid, nor any part thereof, though often requested so to do, to the damage of the plaintiff of ten thousand dollars; and thereupon he brings this suit, etc.

73 By THO'S MACON & WILBUR F. STONE,
Att'ys for Pl'ff.

And afterwards, and on the sixteenth day of June, in the year of our Lord one thousand eight hundred and seventy-three, the same being one of the days of said June term, A. D. one thousand eight hundred and seventy-three, of said court, the following, among other proceeding', were had, to wit:

It is ordered that a term of this court be held, commencing on the twenty-seventh day of October, in the year of our Lord one thousand eight hundred and seventy-three, at ten o'clock in the forenoon of that day, to which summons and other mesne process issued in causes to be hereafter and prior to that day commenced in this court shall be made returnable.

Business shall be transacted at said term in all issues and proceedings then pending in this court in the same manner and with like effect as at the regular term of the court, but no jurors shall be sum-
74 moned to attend at said term.

And afterwards, to wit, on the twenty-eighth day of October, A. D. one thousand eight hundred and seventy-three, the said day being one of the days of the said special term (October term, A. D. one thousand eight hundred and seventy-three) of said court, begun and held at Pueblo, in said Pueblo County and Territory aforesaid, on Monday, the twenty-seventh day of October, A. D. one thousand eight hundred and seventy-three.

Present, Hon. Moses Hallett, chief-justice of Colorado Territory, and judge of the third judicial district of said Territory; George A. Bute, clerk of said court; Abe R. Ellis, sheriff of Pueblo County.

The following, among other proceedings, were had, to wit:

CHALMERS W. TALBOT
vs. } Assumpsit.
GEORGE C. BECKWITH.

75 Now, on this day, comes the said plaintiff, by his attorney, Tho's Macon, and the said defendant, by his attorneys, H. C. Thatcher, Geo. A. Hinsdale, and G. Q. Richmond, also comes, and, on motion of the said plaintiff, it is ordered by the court that the said defendant plead to the said plaintiff's amended declaration herein by the incoming of court by the thirtieth instant.

And afterwards, and on the thirtieth day of October, A. D. one thou-

sand eight hundred and seventy-three, the defendant appeared, by Geo. A. Hinsdale, G. Q. Richmond, and H. C. Thatcher, his attorneys, and filed a plea in words and figures following, to wit:

TERRITORY OF COLORADO,
County of Pueblo, ss:

In the district court of the third judicial district in and for the county of Pueblo. Of the October term, A. D. 1873.

CHALMERS W. TALBOT, PL'T'FF,
vs.
GEORGE C. BECKWITH, DEF'T. } Assumpsit.

76 Plea with notice of special matter.

And the defendant, by his attorneys, G. A. Hinsdale, G. Q. Richmond, and H. C. Thatcher, comes and defends the wrong and injury, etc., and says that he did not undertake or promise in manner and form as the plaintiff has in his declaration thereof in either or any of the counts thereof complained against him. And of this he puts himself upon the country, etc.

By GEO. A. HINSDALE,
G. Q. RICHMOND, &
H. C. THATCHER,
His Attorneys.

The plaintiff will take notice that the defendant will, on the trial of this cause, introduce, on behalf of the defence, testimony to show that a partnership was formed before the commencement of this suit, to wit, on the seventh day of October, A. D. one thousand eight hundred seventy, at the county of Frémont, to wit, the county of Pueblo and Territory of Colorado, by and between Chalmers W. Talbot, Elton T. and Edwin F. Beckwith, and this defendant, regarding the cattle
77 mentioned in plaintiff's declaration, and in every count thereof, and that said partnership still exists; and that the subject-matter of said plaintiff's suit is still the property of said partnership, and that said plaintiff still is and remains a member thereof.

GEO. A. HINSDALE,
G. Q. RICHMOND, &
H. C. THATCHER,
Att'y's for Defendant.

And now comes the plaintiff, by Macon, Stone, and Butler, his att'ys, and by way of replication to the plea by the said defendant by him above pleaded, wherein he puts himself upon the country, the said plaintiff doth the like.

By THOMAS MACON,
WILBUR F. STONE, &
HUGH BUTLER,
Att'y's for Pl'ff.

And afterwards, and on the sixteenth day of December, A. D. one thousand eight hundred and seventy-three, the same being one of the days of the December term, A. D. one thousand eight hundred and seventy-three, of said court, begun and held in Peublo, in said Pueblo

County and Territory aforesaid, on Tuesday, the ninth day of December, A. D. one thousand eight hundred and seventy-three—

78 Present, honorable Moses Hallett, chief-justice of Colorado Territory, and judge of the third judicial district of said Territory; Geo. A. Bute, clerk of said court; Abe R. Ellis, sheriff of Pueblo County—

When the following proceedings, among others, were done, to wit:

CHALMERS W. TALBOT } Assumpsit.
vs.
GEORGE C. BECKWITH. }

This days comes the said plaintiff, by his attorneys, Thomas Macon, Wilbur F. Stone, and Hugh Butler, and the said defendants, by his attorneys, Geo. A. Hinsdale, H. C. Thatcher, and G. Q. Richmond, also comes, and this cause comes on for trial; then comes a jury twelve good and lawful men, to wit, D. A. Savage, Z. G. Allen, Geo. Gilbert, Geo. W. Billey, Lewis Johnson, John Grossgloss, S. M. Waggoner, John M. Dotson, Geo. W. Morgan, William King, Daniel Workman, and A. P. Berry, who were duly empanneled and sworn to well and truly

79 try the issue joined in this cause, and a true verdict render according to the evidence.

And afterwards, to wit, on the seventeenth day of December, A. D. one thousand eight hundred and seventy-three, the same being one of the days of the said December term, A. D. one thousand eight hundred and seventy-three, of said court, the following proceedings were done, to wit:

CHALMERS W. TALBOT } Assumpsit.
vs.
GEORGE C. BECKWITH. }

This day came the said parties, by their respective attorneys, and the jury heretofore and on yesterday sworn and empanneled in this cause, to wit, D. A. Savage, Z. G. Allen, Geo. Gilbert, G. W. Billey, Lewis Johnson, John Grossgloss, S. M. Waggoner, John M. Dotson, George W. Morgan, William King, Daniel Workman, and A. P. Berry, also came, and the trial of this cause is still progressing.

80 And afterwards, to wit, on the eighteenth day of December, A. D. one thousand eight hundred and seventy-three, the same being one of the days of the said December term, A. D. one thousand eight hundred and seventy-three, of said court, the following proceedings were done, to wit:

CHALMERS W. TALBOT } Assumpsit.
vs.
GEORGE C. BECKWITH. }

This day come the said parties, by their respective attorneys, and the jury heretofore sworn and empanneled in this cause, to wit, D. A. Savage, Z. G. Allen, Geo. Gilbert, G. W. Billey, Lewis Johnson, John Grossgloss, S. M. Waggoner, John M. Dotson, George W. Morgan, William King, Daniel Workman, and A. P. Berry, also came, and the trial of this cause is still progressing.

And the said jurors, after hearing all the evidence of witnesses and the arguments of counsel, and the instructions of the court, retired to their room in charge of a sworn bailiff.

81 Afterwards, and on the nineteenth day of December, A. D. one thousand eight hundred and seventy-three, the same being one of the days of the December term, A. D. one thousand eight hundred and seventy-three, the following, among other proceedings, were had, to wit:

CHALMERS W. TALBOT } Assumpsit.
vs.
GEORGE C. BECKWITH. }

This day come the said parties by their respective attorneys, and the jurors heretofore sworn and empanneled in this cause, to wit, D. A. Savage, Z. G. Allen, Geo. Gilbert, G. W. Billey, Lewis Johnson, John Grossgloss, S. M. Waggoner, John M. Dotson, Geo. W. Morgan, William King, Daniel Workman, and A. P. Berry, also come, and return into court their verdict in this cause, as follows:

"We, the jury, find the issue for the plaintiff, and assess his damages at five thousand four hundred and thirty-seven dollars and sixty cents."

82 And afterwards, and on the twenty-second day of December, A. D. one thousand eight hundred and seventy-three, the defendant, by his said attorneys, filed in said clerk's office his motion for a new trial; which said motion is in words and figures following, to wit:

TERRITORY OF COLORADO,
County of Pueblo, ss:

In the district court of the third judicial district of Colorado, in and for the county of Pueblo. Of the December term, A. D. 1873.

CHALMERS W. TALBOT, PL'T'FF, } Assumpsit.
vs.
GEORGE C. BECKWITH, D'F'D'T. }

And now comes the said defendant, Geo. C. Beckwith, by his attorneys, George A. Hinsdale, G. Q. Richmond, and H. C. Thatcher, and moves the court now here to set aside the verdict of the jury in said cause and grant a new trial of said cause, for the reasons following, to wit:

First. Because the verdict of the jury is clearly against the evidence and the weight of evidence.

Second. The verdict is contrary to law.

Third. The verdict is contrary to the instructions of the court.

83 Fourth. The court erred in excluding proper testimony which ought to have been admitted.

Fifth. The court erred in admitting improper testimony.

Sixth. The court erred in refusing to grant the instructions, and each and every one of them, asked by the defendant.

Seventh. The court erred in the instructions given to the jury.

Eighth. The verdict of the jury does not indicate whether the "issue" found for the plaintiff is on the first, second, or third count of the declaration.

And for other good and sufficient reasons manifest on the face of the record.

By GEORGE A. HINSDALE,
G. Q. RICHMOND, AND
H. C. THATCHER,
Att'ys for Defendant.

And afterwards, to wit, on the twenty-seventh day of December, A. D. one thousand eight hundred and seventy-three, the said day being one of the days of the said December term, A. D. one thousand eight hundred and seventy-three, of said court, the following, among other proceedings, were had, to wit:

84 CHALMERS W. TALBOT *vs.* GEORGE C. BECKWITH. } Assumpsit.

The jury by whom the issue joined in this cause was tried, having rendered a verdict herein in favor of the plaintiff and against the defendant, and having assessed the damages of the plaintiff in the premises at the sum of five thousand four hundred and thirty-seven dollars and sixty cents:

Now, on this day, comes the said plaintiff, by his attorney, Wilbur F. Stone, and says that of the damages as aforesaid assessed he does not demand of the said defendant, and will remit to him the sum of one thousand three hundred and twenty-four dollars and sixty cents, which being deducted of the said sum of five thousand four hundred and thirty-seven dollars and sixty cents, there is remaining to the said plaintiff the sum of four thousand one hundred and thirteen dollars for his damages.

Thereupon comes the said defendant, by his attorneys, Geo. A.
85 Hinsdale, H. C. Thatcher, and G. Q. Richmond, and moves the court now here for a new trial herein.

And after argument of counsel, and the court being fully advised in the premises, and due deliberation being thereupon had, it is considered by the court that said motion be overruled; and it is further considered that the said plaintiff do have and recover of and from the said defendant the said sum of four thousand one hundred and thirteen dollars, for his damages, and also his costs and charges by him about his suit in this behalf expended, and that he have execution therefor.

And thereupon the said defendant prays an appeal from the judgment aforesaid to the supreme court of the Territory of Colorado; which is granted by the court.

And it is ordered, that the said defendant, within thirty days from this date, file with the clerk of this court his bill of exceptions and his appeal-bond in the sum of six thousand dollars, with security to be approved by said clerk, conditioned according to law.

86 And afterwards, and on the thirteenth day of January, A. D. one thousand eight hundred and seventy-four, the defendant, by his attorneys, filed in said clerk's office a certain bond, approved; which is in words and figures following, to wit:

Know all men by these presents that we, George C. Beckwith, John H. Morrison, and Peter Winne, of the county of Arapahoe, in the Territory of Colorado, are held and firmly bound unto Chalmers W. Talbot in the penal sum of six thousand dollars, ($6,000,) lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly, by these presents. Witness our hands and seals this 10th day of January, A. D. 1874.

The condition of the above obligation is such that, whereas the said Chalmers W. Talbot, plaintiff, did, on the 27th day of December, A. D. 1873, in the district court of the third judicial district in and

87 for the county of Pueblo, in the Territory of Colorado, at the December term thereof, A. D. one thousand eight hundred and seventy-three, recover a judgment against the above-bounden George C. Beckwith, defendant in an action of assumpsit, for the sum of four thousand one hundred and thirteen dollars and costs of suit, from which judgment the said George C. Beckwith has taken an appeal to the supreme court of the Territory of Colorado:

Now, if the above-bounden George C. Beckwith shall duly prosecute his appeal and shall pay said judgment, costs, and interest, and damages in case the said judgment shall be affirmed, then the above obligation to be void; otherwise to remain in full force and effect.

GEORGE C. BECKWITH. [SEAL.]
JOHN H. MORRISON. [SEAL.]
PETER WINNE. [SEAL.]

Approved by me this thirteenth day of January, A. D. one thousand eight hundred and seventy-four.

GEORGE A. BUTE, *Clerk.*

88 And afterwards, and on the twenty-second day of January, in the year of our Lord one thousand eight hundred and seventy-four, there was filed a certain bill of exceptions; which is in words and figures following, to wit:

TERRITORY OF COLORADO,
County of Pueblo, ss:

In the district court of the third judicial district of Colorado, in and for Pueblo County, of the December term, A. D. 1873.

CHALMERS W. TALBOT, PL'T'FF,
vs.
GEORGE C. BECKWITH, D'F'T. } Bill of exceptions.

Be it remembered that on the trial of this cause at the December term, A. D. one thousand eight hundred and seventy-three, of the said district court in and for Pueblo County, the plaintiff, to maintain the issue on his part, gave in evidence to the jury the following testimony, viz:

CHALMERS W. TALBOT, being sworn in his own behalf, testifies
89 as follows in answer to interrogatories to him propounded, viz:

I am the plaintiff. I know the defendant. On October seventh, A. D. one thousand eight hundred seventy, I entered into an agreement with the defendant and his two sons to take charge of and herd cattle until December fifth, A. D. one thousand eight hundred and seventy-two, at which time defendant was to sell cattle and the increase.

The original costs of cattle was thirty-six thousand six hundred and eighty-one dollars and sixty cents. This amount was to be deducted from what the whole herd should bring when sold, and the balance, representing profits, was to be divided between us equally, that is, the defendant was to have one-half and his two sons and myself the other half in equal proportions; I was to have one-third and the other two boys one-third each. I looked to the defendant for my money. Had not any interest in the two-thirds coming to the two boys.

I performed the contract by herding the cattle for the time, with the assistance of my own herder.

90 (Here the defendant objected to the introduction of any further evidence touching the terms of the contract, on the ground that the contract declared on was not to be performed within a year, was not in writing signed by the defendant, and was, therefore, within the statute of frauds.

This objection the court sustained, and ruled that evidence might be received under the common count in the declaration as to what the plaintiff's services were reasonably worth, as the contract was an executed one.

Whereupon, in answer to interrogatories, the witness, continuing, testifies as follows:)

The cattle ranged over a large extent of country, known as the Wet Mountain Valley, from ten to fifteen miles in width and perhaps twenty-five miles or less in length, which required nearly all the time of myself and herder, and sometimes Sunday, to properly care for and herd the cattle.

I continued this care from December seventh, one thousand eight hundred and seventy, to October fifth, one thousand eight hun-
91 dred and seventy-two, inclusive. There was no particular agreement as to the delivery of the cattle at the expiration of the contract. Beckwith sold from the herd nearly three hundred head of large beeves—two hundred ninety-seven, I think—during the time of my service.

Nearly a year before its expiration, about the time this contract was made, defendant proposed to me that I should go down and watch the McCandless Cañon and build a cabin, and watch the cattle back on that part of the range, and the other boys were to take other parts of the range.

In doing my part of the work it was necessary for me to keep a herder—each of the other boys kept a man and bore the expenses. The defendant made no objections to our keeping herders. He knew it, but he once objected that I kept poor herders. It was not possible for one man to do the work.

The day of the date of the contract, October seventh, one thousand eight hundred and seventy, I had a conversation with the defend-
92 ant. He proposed that I should go down into that part of the country and build a cabin, and herd there during the winter. I had a herder hired at the time, and defendant knew it. I went to the place mentioned and built a house there. I herded the cattle at that point in the manner the defendant mentioned. I am satisfied that defendant knew I had a herder, and I understood that I was to use the services of a herder.

While I was in the hills I drove the cattle back from the places they should not go—gathered them up and herded them on the proper range. In summer I did my share of the branding. I bore my own expenses, and the expenses of the Beckwith boys were born by themselves or their father. My necessary expenses were hiring a herder, use of horses, food, building a house, and other expenses necessary in the business. These expenses were necessary in the herding. The defendant knew at the time I was hired that these expenses were necessary. I do not know that anything was said about who should furnish the
93 money. I was to furnish my own money. My services were rendered for myself.

Question propounded to witness by his counsel. What were your services worth for your own work, your horse, your personal services,

and all money for your own service in herding and taking care of the cattle during the time employed?

Answer. I have known herders to get sixty dollars per month under such circumstances, but they were not as responsible as myself.

Here the court, on its own motion and over the the defendant's objection, reverses its former decision as to the admissibility of the terms of the contract, and holds that as the contract is shown by the witness to have been fully executed, although void as being within the statute of frauds, yet the contract, as well as what the cattle, at the expiration of the time, would have brought over and above the agreed price when contract was entered into, may be proved for the purpose of establishing the measure of the plaintiffs' damages.

To which ruling of the court the defendant, by his counsel, then and there excepted.

94 And it was hereupon agreed between counsel for plaintiff and defendant and the court that all evidence given to the jury hereafter, touching the increase or value of the herd of cattle at the date of the expiration of the contract, should go to the jury over the objection and exception of the defendant; the objections of the defendant being that the testimony was incompetent to establish plaintiff's damages—was irrelevant and calculated to mislead the jury. The court overruling such objections and permitting all such testimony, the defendant excepting.

Here the counsel for defendant asked leave of the court to cross-examine the witness upon the matter of the contract, and as to whether the contract was in writing or not; which leave was granted by the court.

Question to witness by defendant's counsel. Is this the contract (here a writing was handed to witness) which was entered into between yourself and the two Beckwith boys upon the one part and the de-

95 fendant upon the other, and about which you have been testifying, and upon which you seek to recover in this action?

Answer. It is.

Question. Does that writing express the exact terms of the said contract?

Answer. It does.

Here, at the request of the defendant, the said writing, identified as the contract entered into between plaintiff and defendant by the plaintiff himself, was offered and read as evidence before the jury, and is in words and figures following:

WET MOUNTAIN VALLEY, *Oct.* 7, 1870.

This is to certify that the undersigned have taken two thousand two hundred and five head of cattle, valued at thirty-six thousand six hundred and eighty-one dollars and sixty cents on shares from Geo. C. Beckwith; time to expire on the fifth day of December, one thousand eight hundred and seventy-two; then Geo. C. Beckwith to sell the cattle and retain the amount the cattle are valued at above. Of the amount the cattle sell at over and above the said valuation, Geo. C. Beckwith to retain one-half, and the other half to be equally divided between C. W. Talbot, and Elton T. Beckwith, and Edwin F. Beckwith.

96 (Signed) C. W. TALBOT.
ELTON T. BECKWITH.
EDWIN F. BECKWITH.

Question by defendant's counsel. Is the name C. W. Talbot signed to this instrument (referring to the contract just quoted and set out above) your signature?

Answer. It is; and that is the contract referred to, and the only contract. There may have been some other explanations of this contract afterwards. It was entered into on the day of its date.

Here the witness was turned over to the counsel for plaintiff, by whom the following interrogatorias were propounded to said witness:

Question. Did George C. Beckwith assent to and accept the terms of said contract?

To which interrogatory being asked and answered, the defendant, by his counsel, objected, for the reason that the defendant was not bound by said contract or the terms of it, it not being signed by him, and because a verbal assent to the contract by the defendant would not
97 bind the defendant, the said contract, so far as the defendant is concerned, being void under the statute of frauds; which objection the court overruled and permitted the question to be asked and answered; to which ruling of the court the defendant, by his counsel, then and there excepted.

Witness, in answer to said last interrogatory, said:

He assented to said contract and under said contract I acted.

Witness then proceeded, in answer to interrogatories propounded by counsel for plaintiff:

I was in his employ before this contract was entered into, and fifty-five head of cattle was sold from his herd before that time. After the contract was entered into he sold nearly three hundred head. I think in May, one thousand eight hundred and seventy-two; don't know what he realized for them. Defendant never accounted to me for them, nor told me anything about it, that I remember of. At the termination of my contract, deducting the cattle sold, I should estimate there were about three thousand seven hundred head on that range; without this
98 deduction about four thousand head, increase and all. I should think the cows in the herd, which were very fine and picked, were worth about twenty dollars per head. There were about nine hundred thirteen head of cows, which, with the increase, would run up to about one thousand one hundred and thirteen. I never counted them; don't know exactly how many there were.

There were about five hundred beef steers over three years old, and about six hundred and fifty head of cattle over two years old.

There were on Dec. fourth, one thousand eight hundred and sixty-nine, under my old employment, four different lots of cattle; the first lot containing three hundred and four head. There were one hundred and thirteen head of cows received. I get at the number by an estimate of the probable increase. In order to fix amount of cattle December fifth, one thousand eight hundred and seventy-two, I take number of cows and deduct ten per cent. for barren cows and losses, and reckon the
99 increase from the cows at eighty per cent. I also deduct three per cent. loss on steers.

There were of cows and heifers, three years old and upward, on the range at the end of my time, about one thousand one hundred and thirteen head. The cows were worth twenty dollars per head. There was very little market for cattle in Fremont County.

There were about five hundred head of steers over three years old,

worth, say, thirty-five dollars per head; there were three hundred and sixty-five head of steers two and one-half year' old, worth about twenty-five dollars per head. The increase of the stock was mostly half-breed, that is, a cross between Texan and American. The cows were Texan, the bulls generally American, and occasionally a Texan bull run in the herd.

According to my estimate of the number of cattle, at the prices I have named, the original herd with the increase would be worth about sixty thousand dollars. There were thirty-five bulls, as we counted them; I don't know the exact number; I do know of twenty-two. Several bulls of other people run in the herd.

100 There were opportunities to sell these cattle in lots before the expiration of the time. Defendant wrote me to sell. I found one purchaser, and found others who I think would have bought. I wrote to five or six parties in Illinois to find purchasers, and tried to get offers, and told them to address the defendant or myself. I had one offer from one of those; he wanted cattle to feed in Illinois and ship. I sent the letter to the defendant. Beckwith said that the man was too particular, and he wouldn't sell. I had two other offers, and presented them to Beckwith, and he refused to sell. Another man offered to buy part. I was offered for the young stock $18,300. This was the young stock on the range, not counting the original herd, but the increase of the old stock. I think the increase was worth as much as the original stock.

The stock was never counted after we received them. I offered to count them before the end of the contract. Defendant told me they could
101 not be counted. This was in October, eighteen hundred and seventy-two.

Soon afterwards the defendant went to Denver. I proposed to the boys that we would count them. They said it would be difficult to do it. The defendant was not there on the range on the fifth or sixth of December, eighteen hundred and seventy-two. There was nothing said in the contract about delivering the stock on that day or at the end of the term. The defendant claimed the range, or most of it. Defendant said if the cattle were sold, they must be taken off the range in ten days or two weeks thereafter.

In October, eighteen hundred and seventy-two, I had a conversation with the defendant about the sale of the cattle. In regard to the value of the cattle, he made two different statements. He said all he could get for them was thirty-one thousand dollars. On the next day he told me I might sell them for forty thousand dollars. I think this was on the very next day.

Before the commencement of this contract I had performed
102 service for the defendant in herding his cattle from December, one thousand eight hundred and sixty-nine, until October, one thousand eight hundred and seventy. He never paid me in money for these services. We estimated their value at one thousand dollars.

Cross-examination:

I had a settlement with the defendant, or a partial settlement, for these old services at the time this contract was entered into. This settlement was that three thousand dollars was to be deducted from the original costs of the herd, which was thirty-nine thousand six hundred and eighty-one dollars and sixty cents. This deduction was made, and was in settlement of all of my past services. I consented to this under protest, claiming that six thousand dollars should be deducted instead of three thousand dollars. The defendant claimed that he was right, and I signed the contract. This in settlement of previous services. I gave my note to defendant for a balance due him on another account.

The contract was made on Texas Creek, at the house of the Beckwith boys. Parties to contract were all present. There was little con-
103 versation about it. Beckwith drew up this contract and I signed it, but he did not. He kept the contract. My understanding was that I was to have one-third of the one-half of the profits—that is, one-sixth of the profits. Nothing specially was said about it.

The contract read in evidence is the only contract I know of. There was some talk about the payment of taxes on cattle. I thought he ought to pay them, and he did so. I never paid any part of the taxes, unless Beckwith paid for me. I don't know by count how many cows there were. I know by the different lots that came in. I had a memorandum of one lot given me by Beckwith of four hundred. They were put in the tax-list as eight hundred. I take half the increase to be male and half female. As to steers, there were one hundred and ninety-seven in one lot and three hundred in another lot, then twelve, then ten yearlings, and sixty two years old. Of the first lot of three hundred and four I lost ten or twelve. There were four hundred and forty calves on the tally branded for the year one thousand eight hundred and seventy-one, certain; perhaps four hundred and seventy-five.

104 The second year there were seven hundred calves branded when I went into the hills. There may have been others branded afterwards, but I was not present. I make from three thousand seven hundred to four thousand head by calculating eighty per cent. increase. In eighteen hundred and seventy I found on my part of the range from fifteen to twenty-five dead cattle. I had a third of the whole number in my charge, and perhaps more.

I do not know that most of the calves were lost the first year. I never counted them after I branded them. At the end of the contract there was, I estimate, one thousand one hundred and thirteen cows, five hundred steers, three hundred fifty-one yearlings and two-year-olds, eight hundred and eighty calves. The cattle were in good condition. I think calves were worth six dollars each, yearlings from seven to ten dollars each, two-year-olds from eighteen to twenty dollars each, steers three years old and upwards, in a good beef condition, thirty-five dollars each, fine Texas cows twenty dollars each.

105 The defendant gave me liberty to sell the whole herd, with the increase, for forty thousand dollars. I had no opportunity to sell for forty thousand dollars. I found no purchaser. I was offered eighteen thousand three hundred dollars for the increase by one Oscar Smith. I think the young stock was to be lumped. He was to take all for that figure, without regard to the number. I did not sell for forty thousand dollars, because I could not find a purchaser. Later I could not find a purchaser for the whole herd at thirty-one thousand dollars. It wasn't my business to find a purchaser. There were three hundred head sold by defendant during the contract, and fifty-five head before that time.

I furnished money for all my own expenses—my man, my horses, provisions, bedding, clothing, and all incidental necessary expenses for running such an outfit.

I offered, after the contract expired, to round up the cattle, and take my share in cattle instead of money, if he would have to sell at a sacrifice.

The defendant sent his son to make a demand of me of the
106 cattle at the expiration of the contract. I went to Cañon for mail once a week, or once in two weeks—usually stayed overnight. Once or twice longer—detained by snow. I usually went one

road and returned another, so as to look after cattle, at defendant's request.

Re-examined by plaintiff:

There was one lot of ten calves; the first lot that came in, which were counted in the original herd. Then there were one hundred and eighty-five more. The number of cattle brought into the herd at the time of or just before the contract was one thousand two hundred and twenty-five. This number, with the others, made the whole herd. I had no information as to the authority of Beckwith's son, who made demand of me for the cattle at the expiration of the time. This was Ed., who signed the contract with me. My object in offering to get up the cattle after the contract was at an end was to see if defendant would accept the offer. Don't remember particularly what defendant said to this.

ROBERT GARDENER, being produced and sworn on behalf of
107 the plaintiff, in answer to interrogatories by plaintiff's counsel propounded, testifies as follows:

I know the plaintiff quite well. I know the defendant by sight. Am in the cattle business. I know something about the price of Texas cattle in one thousand eight hundred and seventy-two. I spoke to Talbot about buying cattle, and he wrote to the defendant. Before he heard from him I met one of the Beckwith boys, and he told me his father would not sell in small lots. I proposed to buy about nine hundred dollars' worth. This was in December, after plaintiff left the cattle. I then bought at other places Texas cattle, chiefly cows, from three to seven years of age.

This herd of cattle was worth at that time twenty dollars per head. Half-breed, two years past, were worth about twenty-five dollars. I have been in the cattle business only one year. The purchase in December, A. D. one thousand eight hundred and seventy-two, was my first purchase.

JOHN SHIELDS, being produced and sworn in behalf of plaint-
108 iff, in answer to interrogatories by plaintiff's counsel propounded, certifies as follows:

I know the parties to this suit, and the young Beckwiths. I know something of the cattle. They were above the average of Texas cattle. I know nothing about half-breed cattle. I am little acquainted with cattle business. I talked with Talbot about buying cattle, and he referred me to Beckwith, to whom I then wrote and received from him a reply. (Letter here shown witness, which he identified.) I would have bought cattle at reasonable prices—say one thousand or fifteen hundred dollars' worth—at prices to suit me.

JAMES SMITH, being produced and sworn on behalf of plaintiff, in answer to interrogatories propounded by plaintiff's counsel, testifies as follows:

I know the plaintiff and defendant. I know the cattle in controversy. I have known the herd for three years; have seen portions of it almost every day. They are a good class of cattle for Texas. The
109 greater part of the increase are half-breed cattle. I have owned cattle for four years—been in the business for that time. A year ago half-breed two-year old heifers past were worth, I think, twenty-five dollars—more than a full-grown Texas cow. I cannot say that I was

well posted as to the value of cattle at that time, there not being much sale for them in Fremont County. My brother Oscar and I made an offer for two thousand head of the young stock in Beckwith herd, including calves, yearlings, and two-year-olds past. We offered eighteen thousand three hundred dollars. They were not to be lumped. There had to be two thousand head for that figure by count.

I did not know how many cattle were in the herd, but figures were given me by Talbot. Full-grown cows were worth twenty dollars; full-grown beef-steers were worth thirty-five dollars per head; heifers and steers two years old past were worth twelve dollars, and calves six to seven dollars per head.

Witness being cross-examined by defendant's counsel, testifies as follows:

110 I only know the market-value of cattle in December, A. D. eighteen hundred and seventy-two, by small sales among neighbors, and by what I was willing to give. In the lot of two thousand head of young stock, for which I offered eighteen thousand three hundred dollars, I was get twelve hundred fifty head of two-year-olds and yearlings, and seven hundred and fifty head of calves. I considered eighteen thousand three hundred dollars their market-value. I could not have paid for them all cash down.

I didn't know whether there were two thousand head of young stock in the herd, except as Talbot told me. The price was fixed according to grade. The stock was scattered over a range twenty miles long by eighteen miles wide.

GEORGE ROUSE, a witness produced and sworn on behalf of plaintiff, in answer to interrogatories propounded by plaintiff's counsel, testified as follows:

111 I know the parties to this suit, and the cattle in controversy. I know something about cattle; have been handling them over a year. This herd is very good stock.

GEORGE RITTER, a witness produced and sworn in behalf of plaintiff, in an answer to interrogatories propounded by plaintiff's counsel, testified as follows:

I know the parties to this suit. Have handled these cattle. Worked for the Beckwith boys both in eighteen hundred and seventy-one and eighteen hundred and seventy-three in and about these cattle. Worked for them three times, about two months each time. They were a good class of Texas cattle. The increase were mostly half-breeds, of good quality. I helped to herd and brand. I think there were five hundred head of calves branded in all in eighteen hundred and seventy-two. The Beckwith boys and plaintiff were present when we branded. There may have been few calves that were not branded. I don't know the number of the cows and steers, nor their value.

112 OSCAR D. SMITH, a witness produced and sworn on behalf of plaintiff, in answer to interrogatories, testified as follows:

I live in Wet Mountain Valley. Know parties to this suit and the Beckwith cattle. I used to be among them almost every day in the summer until the past year. I have been over the range considerably. I have been in the cattle business seven years. I cannot tell even approximately the number in the herd. My brother and I proposed to buy two thousand head of the young stock for eighteen thousand three hun.

dred dollars. Of this number seven hundred and fifty were to be yearlings past, seven hundred and fifty calves, and the remainder two-year-olds past. I did not think this was their full value. This proposition was made December thirteenth, eighteen hundred and seventy-two. We were not prepared to pay all cash. The amount of cash to be paid down was not named; the last payment to be made in eighteen months or two years; could have paid considerable money down if it had been necessary.

JAMES PRIEST, a witness produced and sworn on behalf of
113 plaintiff, in answer to interrogatories, testified as follows:

Know the parties to this suit. Have been in the cattle business, Texas and American, for about four years past. May have seen this herd in travelling through it. I sold a mixed lot of cattle in Denver a year ago—tail end. I had a conversation with defendant in Denver in September or October, eighteen hundred and seventy-two, at Bailey's corral, about his cattle. He told me that he had given Talbot notice to find purchasers, and requested him to do the best he could for him. He told me he had given Talbot all the chance he could to sell, and that he did not feel that he was obliged to put them up at auction sale and sell for what he could get at a forced sale.

FRANK KENNICOTT, a witness produced and sworn on behalf of plaintiff, in answer to interrogatories, testified as follows:

I know the parties to this suit. I know the cattle. Saw a portion of them on the range almost every day when I was in the valley. I helped
Talbot and the Beckwith boys to brand last summer two or three
114 days. Talbot was away part of the time, and some calves were branded in his absence. There were seven or eight hundred cows on the range. Some of them were barren, that is, missed getting calves. In October, one thousand eight hundred and seventy-two, I talked with Beckwith. He told me he had given Talbot permission to sell the cattle. That Talbot had not done well with the cattle, and that if he were forced to sell them he wouldn't see why he could not sell to Elton Beckwith as well as to any one else. This was when he first came down into the valley.

Cross-examination:

Quite a number of dead cattle were scattered over the range. I think I saw a hundred carcasses; nearly a half of this number within a short distance of Beckwith's house, on the flat. There were a good many beeves among them. The carcasses near Beckwith's house I took to be Beckwith's cattle.

Redirect examination:

Most of the carcasses that I saw that had recently died, perhaps two-thirds of them, had Beckwith's brand.

115 ELTON BECKWITH, a witness produced and sworn on behalf of plaintiff, in answer to interrogatories, testified as follows:

I am son of defendant. I listed cattle for assessment for taxes.
(Here a certified copy of tax-schedule, in words and figures following, was shown the witness:)

"One thousand eight hundred and seventy-two.

"*Tax schedule of real and personal property held by George C. Beckwith, of Fremont County, Colorado Territory.*

"Farming lands: No. of acres, forty.

"Description: N. E. ¼ of N. W. ¼, section thirty-five, township twenty, range sixty-eight. Value, one hundred dollars.

"City and town lots: Lots; block. Lots; block. Lots; block. Lots; block.

"Description: Town; value of improvements on farm, including lands under cultivation, houses, fences, ditches, irrigation, &c.

"Value of hay, grain, vegetables, and other produce now on hand.

"Value of clocks, watches, jewelry, gold and silver plate.

"Value of household furniture exceeding three hundred dollars.

"Average value of merchandize preceeding twelve months.

116 "Average value of commission goods preceeding twelve months.

"Capital employed in manufacturers.

"Moneys and credits, including notes, bonds, mortgages, judgments, deeds, &c., due and owing to; stock and shares in any corporation and company, road, ditch, flume, ferry, bridge, &c.

"Musical instruments.

"Carriages and vehicles of every description.

"Two horses, three months old, two hundred dollars; one mule, seventy-five dollars; asses; one thousand and nine cows, eighteen thousand two hundred and forty-three dollars; four hundred and fifty calves, over three months old, eighteen hundred dollars; seventy-five yearling calves, five hundred and twenty-five dollars; four hundred and eighty heifers and steers, two years old, five thousand two hundred and eighty dollars; six hundred and fifty-two steers, three years old and upwards, thirteen thousand and forty dollars; work-oxen; bulls; sheep, over three months old; swine; goats.

"All other personal property of every description.

"Number of polls.

"Total, thirty-nine thousand three hundred sixty-three dollars.

"Two thousand six hundred and sixty-six.

117 "I, Edwin F. Beckwith, do solemnly swear that I have listed within all the land and all the personal property, money, and credits subject to taxation, owned and held by me, and which I am required by law to list as agent of George C. Beckwith, according to the best of my knowledge. So help me God.

"EDWIN F. BECKWITH.

"Sworn to and subscribed before me, Erach E. Richter, deputy assessor, this fourth day of June, A. D. one thousand eight hundred and seventy-two.

"ERICH A. RICHTER.

"*Extracts from the revised statutes of Colorado Territory.*

"SEC. 12. If the owner, agent, or person having charge of horses, mules, cattle, or sheep, shall fail on or before the tenth day of June to list such animals in the county in which they were being herded or kept on the first day of May of that year, he shall be subject to a penalty of one thousand dollars, to be recovered in any court of competent jurisdiction.

"SEC. 29. If any person, who is known to *be* the assessor to be liable to give in a list and to pay taxes, agreeably to the provisions of
118 this act, shall neglect or refuse to give in his list, made and sworn to, as hereinbefore described, on or before the tenth day of June in each year, the assessor shall fill out a list for such person, putting therein all taxable property which he has reason to believe is owned by said person liable to taxation at its present full, fair, and just value.

"SEC. 31. If any person with whom the assessor shall have left a notice, requiring him to make out a list of property for taxation, shall have no property which by this act he is required to list, either in his own account or on behalf of others, he shall set forth such facts on the blank left with him by the assessor, or otherwise, and shall make oath to the truth thereof and return the same to the assessor on or before the tenth day of June; and every person owning or having charge of property subject to taxation, and required by this act to list the same, who shall fail, neglect, or refuse to do so, as herein required; or who shall return a list known to be erroneous or defective either as to the
119 description of real estate, number, value, or amount of personal property; or who shall willfully make, or fail to make, in such list any statement whatever, whereby he shall avoid assessment of taxes proper to be made against him, shall be subject to a penalty of not less than one hundred or more than one thousand dollars, to be recovered in any court of competent jurisdiction; and it shall be the duty of any assessor or collector having knowledge of a violation of the provisions of this section to report the same to the district attorney.

"One thousand eight hundred and seventy-two.

"*Tax schedule of real and personal property of George C. Beckwith, Fremont Co., Colorado Terr'y.—W'm A. Hull, assessor.*

"You are notified to fill out the within schedule and return to me at the usual place of holding elections in your precinct on the day of , one thousand eight hundred and seventy-three.

,
"*Assessor.*

"TERRITORY OF COLORADO,
"*County of Fremont, ss:*

"I hereby certify that the within is a true copy of the tax schedule of George C. Beckwith for the year A. D. one thousand eight
120 hundred and seventy-two, as the same remains on file in my office.

"Given under my hand and seal of office, as county clerk of said county, this third day of June, A. D. one thousand eight hundred and seventy-three.

[SEAL.] "JOHN WILSON,
"*County Clerk.*"

I think this schedule is a copy of the one I made out for my father. The cattle included in it were herded by Talbot, my brother, and myself, from eighteen hundred and seventy to eighteen hundred and seventy-two. I was the agent of my father, and consider that I was authorized to make out this schedule.

Here the plaintiff offered to read in evidence the said copy of tax-schedule; to the introduction and reading of which in evidence the defendant, by his counsel, objected, for the reasons that it is not competent

evidence to show the number of cattle upon the range, should not, and do esnot, bind the plaintiff, he not having made it out, nor has he been shown to have knowledge of its contents, is irrelevant and calculated to mislead the jury, which objections were overruled by the court,
121 who permitted the said copy of tax-schedule to be read in evidence to the jury; to the overruling of which objections, and the permitting of it to be read in evidence, the defendant by his counsel then and there excepted. Here the said copy of tax-schedule heretofore set out was read in evidence.

GEORGE C. BECKWITH, a witness produced and sworn on behalf of plaintiff, in answer to interrogatories, testified as follows:

I am the defendant. I did not authorize my son Elton or anybody else to make out the tax-list read in evidence. I cannot tell whether I paid the taxes according to this list or not. They drew on me for taxes and I paid them.

Here the witness was shown the four following letters, who identified them as having been written by himself, when they were offered and read in evidence without objection:

Letter number one.

DENVER, COL.,
April thirteenth, one thousand eight hundred and seventy-one.

M'r TALBOT:

SIR: As Edwin is about going, I hastily drop you a few lines.
122 As regards changing your ranch, which you will have to do, I think if you could get Kettle's ranch of Sim. Henthikson's it would be as well as you probably could do. I have just settled for the balance of the cattle that was sold here, and have taken out the taxes which I paid on the cattle and have the balance to put in cattle or have it draw one and one-half per cent. a month. Which do you think would be best to do with it? There is about two thousand three hundred taxable cattle—say about five hundred yearlings, about four hundred two-year-olds, and about eight hundred and twenty-five cows and five hundred four-year-olds, and seventy-five calves.

It is my opinion as you are interested with the boys you had better consult together in making it out. If it was me I would not put in any price on cattle, as they will do as they please. It is the first time in my life that my valuation was questioned. In other counties they tax on'-third less than in Fremont County.

GEO. C. BECKWITH.

You wrote nothing in your two last letters whether you did any-
123 thing about the cow on Red Creek. Every exertion must be made now to get all the cattle out of the foot-hills at once, as if any scattering ones are left behind they will get so wild they can never be got out.

The above postscript has no signature.

Letter number two.

DENVER,
July twentieth, one thousand eight hundred and seventy-two.

M'r TALBOT:

SIR: I drop you a few lines in regard to the cattle. I sold those I

brought up for a little over ten thousand dollars to Hoeffer Brothers. I trusted them on half of the sum. They were thought by all here to be good, but I suppose they lost heavily on them, but hope they will meet their notes.

Cattle are exceedingly low, on account of last winter being so hard. Those that was not ruined by the winter is going out of the business. There is no sale for stock-cattle now. I wrote you on purpose so you can do your best to find a customer to buy the cattle and send them to me, as I will sell for any price you think best to take, as I want to get out of the cattle business.

I have advertised quite extensively and written to a good many parties in the States. The only chance was a man in Illinois of' to trade
124 eight hundred acres farm toward the cattle. Cattle never was so low here before. Choice, fat cattle is offered for two and one-half cents, and at that price they have to peddle them out two and three at a time.

I hope I shall be able to collect the notes, as if I don't it will be bad, although I couldn't have done much else with them, as the cattle was an expense of one hundred and fifty dollars per month.

I want to sell half or the whole of the cattle to one party, as if we sold a few they would pick out the best and then the others would not sell. To sell all the big steers and then divide the balance into two parties would be the best way to sell them. Or if you could find a customer to take two or three hundred, take them as average, I would think best to sell that way.

Maybe some of your acquaintances in Illinois would like to buy them. I want you to do your best to find a customer.

Yours, respectfully,

GEO. C. BECKWITH.

Letter number three.

DENVER,

Sept. twenty-first, one thousand eight hundred and seventy-two.

M'r TALBOT:

125 SIR: On my arrival from the mountains I received your letter. As I have wrote you before, every day I see parties here that is offering their cattle very low, as the hard winter has discouraged them, and that is the cause that cattle is so very low. There is now in the cattle in the valley about twenty-five thousand dollars, and I am frank to say that as the market looks they cannot be sold for more than that sum. I have used every exertion for the last three months to sell. I engaged a man to sell them, and agreed to give him one thousand dollars to make sale of them, and he has written East and advertised and tried to sell, without success.

You suggest giving you a part of the cattle. That is entirely outside of the agreement. Also, where would be the interest on the amount put in the cattle coming from? And also Elton and Edwin would be glad to do the same, but at that rate I would not get my money back I put into the cattle.

The cattle must be sold and settled up according to the agreement. I will do everything I can to sell at the best advantage, and you
126 shall have every chance to get a purchaser for the cattle so as to make the most out of them.

I shall not give up the range, as when the cattle is sold I can buy

three thousand head of stock-cattle from four-year-olds, cows two-year-olds, and yearlings, for twelve dollars a head, mostly large cattle, and I shall do so and put them on a range, and see if I can't make up part what I shall lose in the cattle we now have.

You shall have no chance to complain in my keeping up to the agreement, as I shall strictly, although I have heard you have made complaints to parties, which I think is very unfair, and the parties you told so said so too.

Therefore, I am determined to give you no reasonable cause of complaint, although I shall be willing to leave it to any person. If, on the other hand, if I had not reason to complain when you worked yourself out of coming up with the cattle, while we were out in sleet and raining and out all night in rain-storms, and running our horses while they lay down in the road and died, you was to home taking your comfort.

127 I think that looks little like cause for complaint. Also, you employed the poorest men and boys to herd for you. I should not of mentioned this or made any complaint if I had not heard of your talk. As there will be a large loss in the cattle to me I should make the best of it, and as I have reason to believe there will be a big loss in the cattle falling short in count by loosing strays and stealing, and other ways.

Yours, respectfully,

GEO. C. BECKWITH.

Letter number four.

DENVER,

Nov. tenth, one thousand eight hundred and seventy-two.

M'R TALBOT:

SIR: At first I thought it useless to answer your letter, as I am bound by the agreement to sell the cattle in a very short time; that to commence pulling them out, and of the most desirable in the herd, and suppose I sold this thirty, then thirty and fifty more, until all the most desirable was sold, and at last, which would probably be months, and the balance would not bring enough to make the thirty-one thousand dollars I am offered, who would be the greatest loser? Then I

128 would lose thirty dollars to your one dollar, and by your movements when I was in the valley, that you was the only one that was interested in the cattle.

However, I have prolonged my letter. As for setting a price on the cattle, if you had done your duty you would have had the cattle counted as you agreed to, and as you have seen fit not to perform your part of the contract, the cattle is to be sold as they are, as I see no other way, and as I am advised by the best lawyers here, not one man in a thousand would have given you the chance that I have done.

I notified you to get a purchaser for the cattle months ago, and what have I received from you in return and for my pay? I must say I have never been treated so meanly by a man in my life. My rights was to sell the cattle. Does the agreement say that I was to say anything to you or any one else?

But what next? You quarrelled with me because I would not break the agreement and give you the cattle to sell at figures less than I had kept them in Denver for sale. Now, I have been offered thirty-

129 one thousand dollars for the cattle. I have written to Edwin, and he will state to you what I wrote him to say to you.

Yours, in haste,

GEO. C. BECKWITH.

Being further interrogated by counsel for plaintiff, the witness, George C. Beckwith, testifies:

The beef-cattle, two hundred and ninety-nine head, that I drove to Denver, sold for about ten thousand dollars gross, without deducting any expenses of driving up, herding, or weighing and selling them.

Here the plaintiff rests.

Whereupon the defendant, by his counsel, moves the court to enter a judgment of non-suit against the plaintiff, for the following reasons:

First. Because from the evidence it appears that the contract upon which recovery is sought is void under the statutes of frauds, as by its terms it was not to be performed and could not be performed within one year, and it was not signed by the defendant.

Second. Because from the evidence in the case it appears that the plaintiff, jointly with the others, were to receive one-half of all
130 that was realized from the sale of the original herd with its increase over and above the sum of thirty-six thousand six hundred eighty-one dollars and sixty cents.

Third. Because it does not appear that at the expiration of the contract introduced in evidence that the defendant could have sold the original herd and increase for any sum in excess of thirty-six thousand six hundred and eighty-one dollars and sixty cents.

Fourth. Because the plaintiff has not made such a case as entitles him to recover.

Which motion the court, after argument of counsel, overruled; to which decision of the court, in overruling said motion, the defendant, by his counsel, then and there excepted.

Whereupon the defendant, to maintain the said issue on his part, gave in evidence to the jury the following testimony, viz:

ELTON T. BECKWITH, being produced and sworn on behalf of the defendant, testifies, in answer to interrogatories propounded by defendant's counsel, as follows:

I am a son of the defendant.

(Here the written contract already introduced and read in evi-
131 dence, bearing date October seventh, A. D. one thousand eight hundred and seventy, is shown the witness.)

I recognize this contract. It was entered into between myself, the plaintiff, my brother Edwin, and my father, George C. Beckwith, October seventh, A. D. one thousand eight hundred and seventy.

At that time my father delivered to the plaintiff, myself, and my brother Edwin, two thousand two hundred and five head of cattle. At the expiration of the contract the cattle and increase were to be sold, and George C. Beckwith was to receive one-half of the proceeds, and Talbot, my brother, and myself, were to receive the other half, after deducting the sum of thirty-six thousand six hundred and eighty-one dollars and sixty cents, the costs of the original herd.

I do not remember what agreement there was in regard to rounding up and delivering the cattle at expiration of this contract. I do not remember that anything was said about it when the contract was made.

We took the cattle at the valuation of thirty-six thousand six hundred and eighty-one dollars and sixty cents, and at the end of the time they and their increase were to be sold and the profits were to be divided, one-half to my father and the other half to go to Talbot, my
132 brother, and myself.

The understanding was that one-half of the profits was to be paid to us three, and that was the only understanding with George C. Beckwith. I do not remember that anything particularly was said as to how we three should divide our half, except what is in the contract. We talked over the matter before signing the paper; one-half the profits was to be paid by my father to us three.

The loss of cattle during the continuance of this contract was considerable. There were a good many dead cattle laying around; there are a great many cattle in the hills yet wild, and a good many dead. I saw five dead in one heap—some died of poison weed. I think three or four hundred head died.

In A. D. one thousand eight hundred and seventy-one there were four hundred calves or about that number branded. In A. D. one thousand eight hundred and seventy-two there were seven hundred head or more of calves branded. Perhaps three or four hundred head would cover both the dead cattle and those that strayed into the hills.

133 In the summer the range was in an open valley six miles wide and twenty miles long. In the winter snow drove the cattle into the hills between Wet Mountain Valley and the Arkansas River, in a very rough broken country, many pinions and scrub pines. Sometimes we three herded together and sometimes separately.

One winter Talbot built a cabin at the springs in the hills, and looked after that part of the range. My brother and I helped to build the cabin, and paid our men, and Talbot paid his men. My brother and his men built the corral at my brother's place.

I have never received anything in settlement of my proportion of profits from the defendant or any one else. I do not remember that I received any instructions from the defendant in regard to the sale of cattle. The defendant made Talbot, my brother, and myself this proposition. He said: "You go to work and round up all our cattle, and for all you gather up over two thousand four hundred head I will give you five dollars per head." We did not gather them up. I do not remember what Talbot said. I know he did not gather them up, or attempt
134 to do it. Neither Talbot, my brother, or myself have ever counted the cattle since October seventh, one thousand eight hundred and seventy. I know I never have, and Talbot has told me that he has not counted them or attempted to do so. I do not know how many cattle were in the range at the end of the contract. When father made the proposition to us to count them, Talbot claimed there were over two thousand eight hundred head then.

Cross-examination:

(The contract is again shown to witness.)

I wrote that contract after we talked it over. It embodies what we talked of. I know no other contract. We three were to receive one-half the profits together. I was with the cattle most of the time from October seventh, seventy, to December fifth, seventy-two. I had to ride about fifteen miles on my part of the range out among the hills. The range is Government land. We went on that range under the direction of the defendant. I heard of many dead

cattle, and saw many during the contract. I should judge that
135 one hundred or one hundred and fifty died during that time. The rest of the number that I named a' missing were estrays out in the hills. I know of one band of thirty that are wild in the hills. I don't miss any particular ones.

In the spring, after Talbot left, I hired men to gather up the cattle on the Arkansas. I had heard the previous summer, before Talbot left, that these cattle were gone. I had no more to do with getting them up than the others. I do not know how many steers there were in the herd. There were over nine hundred cows. We had a few more cows in seventy-two than in seventy-one; perhaps one hundred more.

Talbot might have worked on the cabin when we did. The conversation that I referred to about gathering up the cattle was at the time of a dispute as to the number. Defendant said that, for all over twenty-four hundred that we might gather up, he would give us five dollars a head. Talbot failed to gather them up. I intended to do it, and thought Talbot was going to do it. I said nothing to Talbot about it. Defendant has never settled with me.

136 I am still with the cattle. My brother and I still work under the old contract, as the cattle had not been sold. We had no agreement about a new contract. I am still working about any agreement but the old contract.

GEORGE C. BECKWITH, a witness produced and sworn in behalf of defendant, in answer to interrogatories, testified as follows:

I am defendant. On October seventh, eighteen hundred and seventy, in the cabin in Wet Mountain Valley, with the plaintiff and my two sons, Elton T. and Edwin F. Beckwith, I had a conversation in regard to a contract. The matter was all talked over, and, I thought, understood. I said to my son Elton: "You understand the matter. Will you take a pen and paper and write the contract?" He wrote it. Talbot read it, and signed it, and then my sons signed it. The terms of my agreement with them were that they three should take the cattle at a valuation of thirty-six thousand six hundred and eighty-one dollars and sixty cents, and herd them to the fifth day of December, seventy-
137 two. I was to have half the profits and the boys one-half.

The cattle and their increase were to be sold at the end of the time, and after deducting thirty-six thousand six hundred and eighty-one dollars and sixty cents from the proceeds I was to pay them one-half of the residue. Nothing was said about paying a certain sum to any one of them. I had nothing to do with the distribution of the half going to them. That was to be determined by themselves.

Two thousand two hundred and five head of cattle were delivered to them. There was an increase of four hundred calves the first year and seven hundred the second year, as far as I could learn. I don't know whether the information came from Talbot or my sons. The least that I should put the dead animals, in riding over the range, is from one hundred to one hundred and fifty, mostly cows and large steers. Quite a number in the herd were old and worthless, poor and unmarketable. There were from hundred to hundred and fifty of this class,
138 worth not more than from five to ten dollars a head at the highest figure. December, seventy-two, the beef-steers were worth not to exceed twenty dollars a head at the extreme in Fremont county. There was no market there. Two-year old half-breed steers and heifers were then worth ten dollars, and yearlings seven dollars; calves, four to five dollars each. The two thousand two hundred and five head in-

cluded every animal in the herd. There were one hundred and eighty-five calves in one lot, and one calf in a lot of twelve hundred and ninety-five, and in another lot of cattle one calf.

I cannot remember the proportion and grades of the cattle. I sold two hundred ninety-nine head of beeves in the time in Denver, in June, seventy-two, for ten thousand and thirteen dollars—none of it in cash. Five thousand dollars of it payable in sixty or ninety days, and for the balance I took property. I have received the five thousand dollars in money. My expenses, paid out of these five thousand dollars,
were as follows, to wit: Cost of driving cattle from the range to
139 Denver, two hundred dollars; paid Harrison for herding in Denver, one hundred and forty-nine dollars and fifty cents; paid for hay for use of cattle, twenty dollars; paid agent for helping to negotiate sale, five dollars; paid taxes upon cattle out of said sum, five hundred and twenty-nine dollars for eighteen hundred and seventy-one, and five hundred and fifty dollars for seventy-two. It was the agreement that the taxes were to be paid in that manner.

After October seventh, eighteen hundred and seventy, I put in the herd the following additional cattle: thirteen large choice steers, worth three hundred and twenty-five dollars; four work-oxen, worth one hundred dollars; two bulls, worth forty doll's each—eighty dollars; eight bulls, wor[illegible] two hundred thirty-five dollars. These were turned over to my sons and Talbot, and put in the herd.

I never made a stronger effort in my life with less success than I did to sell cattle at the end of the time. I wrote to parties in the States,
and employed a man in Denver to find buyers. I sent one man
140 down to the ranche to look at the cattle with a view to buying. He returned and refused to make an offer.

I authorized Talbot first to sell the herd and increase for forty thousand dollars. After that sent word to Talbot by my son as agent to find me a buyer at thirty-one thousand dollars. The offer of eighteen thousand three hundred dollars I know nothing of. Before I came to Pueblo at this term of court I made an offer to Talbot and my sons that I would pay them five dollars a head for all the cattle of the herd they could gather up over two thousand four hundred. He, Talbot, said he would accept the offer. The next day he said he wouldn't do it. I wrote to Talbot about a trade I had in view with a man from California for thirty-one thousand dollars. The trade was never made. The agreement, as I understood it, was the cattle were to be redelivered to me at the end of the time, December sixth, seventy-two.

I sent my son to request Talbot to deliver me the cattle. My son notified me that Talbot would not deliver them to me; that he was not prepared, I think, was the answer.

141 Cross-examination:

I asked one of my boys to draw the contract, which he did. The contract was delivered to me after it was signed, and has remained in my possession ever since until this trial. I don't know whether I looked at it before they signed it or not. It is the contract, as we talked it over. I sold two hundred ninety-nine head of beeves for ten thousand and thirteen dollars in Denver in June. Took them up the first week in May. I think I wrote Talbot what I had got for the cattle. Did not tell him of the trade for property. The man lost three thousand dollars by the trade.

I got a large price for the cattle by trading for property. I had memorandum of the number and grade of cattle, and have not remembered

it since. Every animal was counted as one. We gave in tax-list of cattle by guess.

I can't swear to any number of cattle at any time. They were on the range. We couldn't tell the number after October, seventy. There were one hundred and eighty-seven calves at time of delivery.

142 Before this trouble came up I rode over the range and saw perhaps thirty or forty of my cattle dead. Some died of poison vines. I thought that all I saw were mine. I think all the settlers from Stoxe's to Hayden's had cattle—mostly American. I took it for granted that most of the dead cattle were mine. Davis had his cattle there at the time. Couldn't tell how many cattle of others ranged in there or my own. Couldn't tell how many beef-steers were on the range at the time the contract expired in any manner.

I drove ninety beef-steers back from Denver to the range too poor to sell. There are one hundred and fifty old cattle of this herd on the range not worth five dollars a head.

No one can tell how many cattle are on the range without an actual count. I knew the contract was nearly out when I was down there in Sept'r, seventy-two. Talbot did not offer to count the cattle. I did not tell him the horses were too tired to use in rounding up, nor did I so tell Kenincott. I' would cost thousand dollars to get up cattle. I

143 expected they would be delivered as in any other business transaction, that they would all be got together and delivered to me, as much as I was alive. I expected this all the time.

I did not authorize Talbot to sell in small lots. I wrote to Talbot that if we could sell the steers and others in lots it would be best. I did not authorize him to sell in lots of three hundred. I do not recollect that Talbot notified me that he could find a buyer for small lots. He may have said that he could sell in small lots, a dozen or so.

I might have written to Talbot declining to sell in such lots. I think Talbot sent me a letter from a party in Illinois. I did not answer the letter. I do not think the Illinois man wanted several thousands. Didn't say that I had offered to sell for thirty-one thousand dollars. I might have written to Talbot that I had such an offer.

In trying to sell I didn't know the number of cattle, I estimated it. This was after we had the dispute about the two thousand four hundred head. The two thousand four hundred head at thirty-one thous-

144 and dollars would be better prices than I have stated they were worth.

EDWIN F. BECKWITH, a witness produced and sworn on behalf of defendant, in answer to interrogatories, testified as follows:

I am son of defendant. (Here contract of October seventh was shown to witness.) I and my brother and plaintiff were to take two thousand two hundred and five head of cattle at a valuation of thirty-six thousand six hundred and eighty-one dollars and sixty cents for two years and two months. Herd with increase then to be sold. Of amount realized, after deducting the original costs, the defendant was to get one-half of the balance, and my brother Talbot and myself the other half. We herded the cattle, branded them, and took care of them. The cattle were not redelivered at the end of the time.

The range is a rough and extensive one. Talbot assisted. During the winter Talbot was not in that part of the range in the hills

145 near the spring. In the summer we herded together. My brother, I, and men built the cabin for Talbot. I think Talbot did the cooking at the time.

The one-half the profits was to be paid to us three together. I did not look to the defendant for a one-sixth of the profits. Two hundred head or more died and strayed in the time. One hundred twenty-five or one hundred and thirty head died, mostly cows and steers. Strays were mostly steers, I think.

In Dec., seventy-one, there were about four hundred calves, and in Dec., seventy-two, about seven hundred calves. I identified most of the dead cattle by their brands to be ours. I know the number of calves from the tally kept when we branded them. The increase of the herd during the time of contract I would estimate to be eight or nine hundred head. We received the full number of two thousand two hundred and five head. I think defendant and plaintiff counted them before the signing of the agreement.

Cross-examination:

This paper is the contract, (referring to the contract shown
146 him.) On the sixth of Dec., seventy-two, the defendant demanded the delivery of the cattle of my brother and myself, and I made the demand known to Talbot; and, acting as father's agent, I made the demand of him. The demand came to us in a letter, which letter we received from the defendant at Denver before the fifth of Dec., seventy-two.

I did not tell Talbot that I had any authority from defendant to make demand. I identified the dead cattle by a brand on the left hip. They mostly died in the spring, about the time poison weed sprung up. Part of the strays were on the Hardscrabble part, in Pleasant Valley, twelve miles off the range. There were twenty-five or thirty head in Pleasant Valley. I heard of the strays in the Hardscrabble over a year ago, but did not go down there.

CHARLES D. PECK, a witness produced and sworn on behalf of defendant, in answer to interrogatories, testified as follows:

I am engaged in the business of butchering and buying and shipping cattle, and have been engaged in that business for several years. I was buying and shipping cattle in November and December, eighteen
147 hundred and seventy-two, and know their market-value at that time. Choice Texas beef-steers, four year old and upward, ranged from twenty-two dollars and fifty cents to twenty-five dollars. I bought and shipped several hundred at that time, making the purchases both in this and adjoining counties. Three-year-old Texas steers, fit for market one year ago, were worth fourteen or fifteen dollars. A mixed lot of Texas and half-breed two-year-old heifers and steers were worth fifteen dollars. Half-breed yearlings past were worth thirteen dollars.

There was a great diminution in the value of cattle between Oct., seventy, and Dec., seventy-two. Every grade of Texas cattle depreciated in value from fifteen to eighteen per cent. Texas steers mature at six or seven years of age. I bought no Texans under four years old. I have seen the Beckwith herd; did not observe it closely enough to judge of its quality—merely rode over the range.

HENRY W. CRESSWELL, a witness produced and sworn on behalf of the defendant, in answer to interrogatories, testified as follows:

148 I reside in Pueblo County. I am in the cattle business largely. Have been in the business for ten years. I am selling cattle every year. A year ago Texas beef-steers, four years old and upwards, were

worth twenty-five dollars per head. Four-year-old steers are considered beef-steers, and all above age go in the same. Beef-steers three years old, in December, seventy-two, were worth about twenty dollars.

There has been a great depreciation in the value of cattle during the past three years. The decrease in value of Texas cattle, from Oct., eighteen hundred and seventy, till December, eighteen hundred and seventy-two, was about thirty per cent. Acclimated Texas cows, without calves, were worth fourteen or fifteen dollars. A mixed lot of two-year-old Texas and half-breed steers and heifers were worth thirteen dollars per head. Half-breed steers and heifers were worth sixteen dollars; yearling half-breeds were worth from ten to twelve dollars; acclimated Texas cows, with half-breed calves, were worth twenty dollars.

Cross-examination:

I sold some small lots at these prices. My cattle were accli-
149 mated. Cattle are worth about a dollar a head more in small lots than in large. Cattle worth twenty dollars in seventy were not worth more than fifteen dollars in seventy-two. This is the price for cattle just come through from Texas. Texas cattle that are acclimated—that is that have been in the country for some time—are worth two dollars per head more than through cattle.

ROBERT GRANT, a witness produced and sworn on behalf of defendant, in answer to interrogatories, testified as follows:

I am engaged in the cattle business, and have been for several years; I am a butcher; am buying some cattle nearly all the time. A year ago, four-year-old Texas beef-steers were worth from twenty-two to twenty-five dollars; three-year-old Texas beef-steers were worth from eighteen to twenty dollars; acclimated Texas cows were worth fourteen dollars; two-year-old Texans, thirteen to fifteen dollars per head; yearlings past about eleven dollars; Texas cow, with a half-breed calf, from eighteen to twenty dollars; yearling half-breeds past were
150 worth thirteen dollars; two-year-olds were worth eighteen to nineteen dollars. The depreciation in the value of Texas cattle from eighteen hundred and seventy to eighteen hundred and seventy-two was from fifteen to eighteen per cent. Texas cows in eighteen hundred and seventy were worth from sixteen to seventeen dollars.

Cross-examination:

Small lots much higher; cows, fit for slaughter, worth from four to six dollars a head more than average price for small lots; cattle at retail average one dollar a head more than at wholesale.

Here defendant rested his case.

Whereupon, for purposes of rebuttal, the plaintiff recalled M'r Rouse, who, being interrogated by plaintiff's counsel, testified as follows:

I saw Elton T. Beckwith on Oak Creek, and had a conversation about the beef-steers. Elton came and staid with us talking about cattle they had. M'r Griffin, then being present, asked Elton how many beef-steers he had; he replied about six hundred.

151 This answer was excluded by the court on the ground that it was not responsive.

And this was all the evidence given by both parties in the cause.

Be it further remembered, that after the close of the evidence in said cause, and the argument of counsel, the court on its own motion gave to the jury the following instructions, to wit:

CHALMERS W. TALBOT }
vs.
GEORGE C. BECKWITH. }

The plaintiff seeks to recover for services alleged to have been rendered to defendant prior to Oct. seventh, one thousand eight hundred and seventy, and upon a contract of that date. As to any money alleged to be due from defendant to plaintiff on the seventh of October, eighteen hundred and seventy, if at that date the plaintiff entered into a contract with defendant and others, by which he, with others, was to receive certain cattle from defendant of a value then agreed upon, to be herded and cared for by plaintiff and others for a time, and if
152 you further find from the evidence that plaintiff then agreed with defendant to relinquish to defendant any demand that he had for such money in consideration that defendant would deduct from the estimated value of such cattle the sum of three thousand dollars, and that such deduction was in fact made, then the plaintiff cannot recover money alleged to have accrued to him prior to that date.

As to the occurrance of Oct. seventh, eighteen hundred and seventy, if you believe that a contract was made on that day, so far as this branch of the case is concerned, the plaintiff must recover according to the terms of the contract, if at all. If cattle were received by plaintiff and Elton T. and Edwin F. Beckwith at a valuation of thirty-six thousand six hundred and eighty-one doll's and sixty cents, to be cared for and herded until Dec. fifth, eighteen hundred and seventy-two, and they were so herded and cared for, and plaintiff and Elton T. and Edwin F. Beckwith were to receive each one-sixth part of the sum obtained from the sale of the cattle at the expiration of that time over and
153 above the said sum of thirty-six thousand six hundred and eighty one dollars and sixty cents, and the cattle were worth no more in the market than that sum at the expiration of the time fixed by the contract, the plaintiff cannot recover.

On the other hand, if such was the contract, and the cattle were worth more than the said sum of thirty-six thousand six hundred and eighty-one doll's and sixty cents at the expiration of the time fixed by the agreement, and plaintiff might and could have obtained more than that sum for them at that time, then the plaintiff may recover the one-sixth part of the sum which might have been obtained aforesaid, after deducting the said sum of thirty-six thousand six hundred and eighty-one dollars and sixty cents.

In estimating the value of the cattle at the expiration of the contract you should include those sold during the time specified in the contract, if any were sold.

If the jury find for the plaintiff, then they will compute and ascertain from the evidence the amount he ought to recover, and to such amount they will add interest at the rate of ten per cent. per annum from
154 May twelfth, eighteen hundred and seventy-three, up to the present time.

If you agree upon a verdict, you will write it out and place it in an envelope, together with these instructions. This should be sealed and retained by your foreman until the court shall convene to-morrow morning at nine o'clock, at which time you will all attend for the purpose of delivering the verdict. In this event you will not communicate to any one the result of your deliberation, nor converse with any one about the case until after your verdict has been announced in court. Any violation of the law in this particular will be severely punished.

And the above were all of the instructions given to the jury in this cause, to the giving of each and every one of which instructions the defendant, by his counsel, then and there excepted.

Be it further remembered, that after the close of the testimony, and before the jury had retired to consider of their verdict, and before the close of the argument of counsel to the jury, and at the proper
155 time, the defendant, by his counsel, asked the court to give to the jury the following instructions in writing, to wit:

If the jury find from the evidence that the plaintiff, with two others, entered into a contract with defendant for the herding and caring for defendant's cattle, and that under the terms of said contract the plaintiff with others received said cattle, and that they were to gather up and turn over to defendant said cattle, with their increase to defendant, before sale, they must further find that the plaintiff did offer to redeliver or did redeliver said cattle to the defendant, before plaintiff can recover.

If the jury believe from the evidence that the plaintiff entered into an agreement & contract with Elton T. Beckwith and Edwin F. Beckwith jointly, whereby the said three persons were to herd and keep the cattle of the defendant, between the dates set forth in said contract, for one-half of the net profits arising from the increased value of the said herd during the time they contracted to herd and keep the same, then he cannot recover unless it should further appear in evidence that
156 the defendant has settled and adjusted the account of the joint dealings of the plaintiff and the said Edwin F. and Elton T. Beckwith, and promised to pay the defendant his separate share of the profits arising out of said contract.

But the court refused to give the said above instructions or either of them to the jury, to which refusal and action of the court the defendant by his counsel then and there excepted.

Be it further remembered that after the jury had returned their verdict in this cause into court, which verdict was against the defendant, defendant by his counsel filed the following motion for a new trial, to wit:

TERRITORY OF COLORADO,
County of Pueblo, ss:

In the district court of the third judicial district of Colorado, in and for the county of Pueblo. Of the December term, A. D. one thousand eight hundred and seventy-three.

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vs.
GEORGE C. BECKWITH. } Assumpsit.

And now comes the said defendant, George C. Beckwith, by his
157 attorneys, George A. Hinsdale, G. Q. Richmond, and H. C. Thatcher, and move the court now here to set aside the verdict of the jury in said cause and grant a new trial of said cause for the reasons following, to wit:

First. Because the verdict of the jury is clearly against the evidence and the weight of evidence.

Second. The verdict is contrary to law.

Third. The verdict is contrary to the instructions of the court.

Fourth. The court erred in excluding proper testimony which ought to have been admitted.

Fifth. The court erred in admitting improper testimony.

Sixth. The court erred in refusing to grant the instructions and each and every one of them asked by the defendant.

Seventh. The court erred in the instructions given to the jury.

Eighth. The verdict of the jury does not indicate whether the issue found for the plaintiff is on the first, second, or third count of the declaration.

And for other good and sufficient reasons manifest on the face of the record.

By GEORGE A. HINSDALE,
G. Q. RICHMOND,
H. C. THATCHER,
Attorneys for Defendant.

158 Whereupon the court, after taking the said motion for a new trial under advisement, announced in open court that, as the verdict was clearly excessive, unless the plaintiff herein would remit of the amount of the verdict returned by the jury the sum of thirteen hundred and twenty-four & $\frac{\text{sixty}}{00}$ dollars, and agree to permit a judgment to be entered in his favor for the sum of four thousand one hundred and thirteen dollars, he would grant a new trial in said cause and sustain defendant's motion therefor.

Whereupon plaintiff, by his counsel, agreed to remit of the verdict the said amount specified by the court; upon which the court overruled defendant's said motion for a new trial, and gave judgment for the plaintiff. And to the action of the court in requiring said remittance, and announcing to the plaintiff that he would grant a new trial unless it was made, and his overruling of defendant's said motion for a new trial and giving judgment against defendant, the defendant, by his counsel, then and there at the proper time excepted.

And inasmuch as the matters aforesaid do not appear of record, the
159 counsel for the defendant presents this bill of exceptions, and prays that the same may be signed and sealed by the court and made a part of the record in said cause; which is accordingly done this twentieth day of January, A. D. one thousand eight hundred and seventy-four.

[SEAL.] (Signed) MOSES HALLETT,
C. J. & Judge, &c.

TERRITORY OF COLORADO,
County of Pueblo, ss:

I, George A. Bute, clerk of the district court of the third judicial district of Colorado Territory, within and for the county of Pueblo, do hereby certify the above and foregoing to be a true, perfect, and complete copy of the record and proceedings in a certain cause pending in said court, on the common-law side thereof, wherein Chalmers W. Talbot is plaintiff and George C. Beckwith is defendant.

Witness my hand and official seal this fourth day of February A. D. 1874.

{ SEAL OF DISTRICT COURT PUEBLO. } GEORGE A. BUTE, *Clerk.*

160 (Indorsed:) G. D. No. 136. Term No. 22. In the supreme court. George C. Beckwith, appellant, vs. Chalmers W. Talbot, appellee. Record. Appeal from Pueblo district court. Filed February 11th, 1874. John W. Webster, clerk.

And afterwards, on, to wit, the same 11th day of February, A. D. 1874, the same being one of the days of the regular February term, A. D. 1874, of the supreme court of the Territory of Colorado, there was filed in the above-entitled cause the assignment of errors herein, which said assignment of errors is in words and figures as follows, to wit:

TERRITORY OF COLORADO,
County of Arapahoe:

In the supreme court of the Territory of Colorado, February term, A. D. 1874.

161 GEORGE C. BECKWITH, APPELLANT,
vs.
CHALMERS W. TALBOT, APPELLEE. } Assignment of errors.

And now comes the above-named appellant, by his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. The court erred in ruling upon the trial of said cause that the contract and what the cattle would have brought over and above the agreed price when the contract was entered into might be proved as the measure of the plaintiff's damages.

2. The court erred in permitting upon the trial of said cause, and over appellant's objections, the witnesses Chalmers W. Talbot, Robert Gardner, James Smith, George Ritter, and Oscar D. Smith, and each of them, to testify concerning the increase of the herd of cattle in controversy, and concerning the value of the cattle at the date of the expiration of the contract between the parties.

3. The court erred in permitting the witness Chalmers W.
162 Talbot, upon the trial of said cause, and over appellant's objection, to testify that the appellant assented to and accepted the terms of the contract in writing testified to by the said Chalmers W. Talbot.

4. The court erred in permitting to be read as evidence to the jury, upon the trial of said cause, and over appellant's objections, a certified copy of a tax-schedule shown to the witness Elton Beckwith and testified to by him.

5. The court erred in admitting improper evidence upon the trial of said cause.

6. The court erred in refusing to enter judgment of nonsuit in said cause on motion of appellant.

7. The court erred in charging the jury, in the second instruction given by the court, that "as to the occurrence of October seventh, eighteen hundred and seventy, if you believe that a contract was made upon that day, so far as this branch of the case is concerned the plaintiff must recover according to the terms of it, if at all. If cattle were received by the plaintiff, and Elton T. and Edwin F. Beckwith, at a valuation of
163 thirty-six thousand six hundred and eighty-one dollars and sixty cents, to be cared for and herded until Dec. fifth, eighteen hundred and seventy-two, and they were so herded and cared for, and plaintiff and Elton T. and Edwin F. Beckwith were to receive each one sixth part of the same, obtained from sale of the cattle, at the expiration of that time, over and above the said sum of thirty-six thousand six hundred eighty-one dollars and sixty cents, and the cattle were worth no

more in the market than that sum at the expiration of the time fixed by the contract, the plaintiff cannot recover.

"On the other hand if such was the contract, and the cattle were worth more than the said sum of thirty-six thousand six hundred and eighty-one dollars and sixty cents at the expiration of the time fixed by the agreement, and plaintiff might and could have obtained more than that sum for them at that time, then the plaintiff may recover the one-sixth part of the sum which might have been obtained as aforesaid after deducting the said sum of thirty-six thousand six hundred and eighty-one dollars and sixty cents."

164 8. The court erred in charging the jury, in the fourth instruction given by the court, that "if the jury find for the plaintiff, then they will compute and ascertain from the evidence the amount he ought to recover, and to such amount they will add interest at the rate of ten per cent. per annum from May twelfth, eighteen hundred and seventy-two, up to the present time."

9. The court erred in refusing to give to the jury the instructions, and each and every one of them, asked for by the appellant.

10. The court erred in refusing to instruct the jury as prayed for by appellant that "if the jury find from the evidence that the plaintiff with two others entered into a contract with the defendant for the herding and caring for defendant's cattle, and that under the terms of such contract the plaintiff with others received said cattle, and that they were to gather up and turn over to defendant said cattle with their increase before sale, they must further find that said plaintiff did offer to

165 redeliver or did redeliver said cattle to the defendant before plaintiff can recover."

11. The court erred in refusing to instruct the jury, as prayed for by appellant, that "if the jury believe from the evidence that the plaintiff entered into an agreement and contract with Elton T. Beckwith and Edwin F. Beckwith jointly, whereby the said three persons were to herd and keep the cattle of the defendant, between the dates set forth in said contract, for one-half of the net profits arising from the increased value of the said herd during the time they contracted to herd and keep the same, then he cannot recover unless it should further appear in evidence that the defendant has settled and adjusted the account of the joint dealings of the plaintiff and the said Edwin T. and Elton F. Beckwith, and promised to pay the plaintiff his separate share of the profits arising out of said contract."

12. The court erred in overruling appellant's motion for a new trial in said cause.

13. The verdict of the jury is clearly against the evidence and the weight of evidence.

14. The verdict is contrary to law.

166 15. The verdict is contrary to the instructions of the court.

16. The court erred in rendering judgment upon the pleadings in the cause.

17. The court erred in rendering judgment upon the issues joined.

18. That there are other manifest errors appearing upon the face of the record.

By reason whereof the appellant prays that the said judgment may in all things be reversed.

By JOHN Q. CHARLES,
PHELPS,
THOMAS M. PATTERSON,
CHARLES S. THOMAS,
Appellant's Attorneys.

(Endorsed:) G. D. No. 136. Term No. 22. In the supreme court. George C. Beckwith, appellant, vs. Chalmers W. Talbot, appellee. Assignment of errors. Filed February 11th, 1874. John W. Webster, clerk. John Q. Charles, Phelps, Tho's M. Patterson, Cha's S. Thomas, appellant's attorneys.

167 And afterwards on, to wit, the 2nd day of March, A. D. 1874, the same being one of the regular days of the February term, A. D. 1874, of he supreme court of the Territory of Colorado, the following proceedings in the above-entitled cause were had in said court and entered of record, to wit:

GEORGE C. BECKWITH, APPELLANT, *vs.* CHALMERS W. TALBOT, APPELLEE. } No. 136. Appeal from district court, Pueblo County.

At this days comes the said appellant, by T. M. Patterson, Charles & Phelps, esq'rs, his attorneys, and the said appellee by Hugh Butler, esq., his attorney, also comes, and this cause coming on to be heard it is ordered by the court that said appellant file his argument herein by Monday, the ninth day of March next ensuing.

And afterwards on, to wit, the 9th day of March, A. D. 1874, the same being one of the regular days of the February term, A. D.
168 1874, of the supreme court of the Territory of Colorado, the following proceedings in the above-entitled cause were had in said court and entered of record, to wit:

GEORGE C. BECKWITH, APPELLANT, *vs.* CHALMERS W. TALBOT, APPELLEE. } No. 136. Appeal from district court, Pueblo County.

At this day comes the said appellant, by Mess'rs Thomas & Patterson, & Charles & Phelps, his attorneys, and the said appellee, by Hugh Butler, esq., his attorney, also comes, and this cause coming on to be heard was submitted by said appellant, upon written briefs filed herein, to the consideration and judgment of the court, and it is ordered by the court that said appellee file his briefs herein by Wednesday, the eighteenth day of March next ensuing, and that the said appellant reply thereto by Monday, the twenty-third day of March next thereafter.

And afterwards on, to wit, the 18th day of March, A. D. 1874, comes the said appellant, by his attorney, and files in the office of the
169 clerk of the supreme court of the Territory of Colorado a certain affidavit, which is in words and figures as follows, to wit:

TERRITORY OF COLORADO:

In supreme court, February term, A. D. 1874.

GEORGE C. BECKWITH, APPELLANT, *vs.* CHALMERS W. TALBOT, APPELLEE. }

Hugh Butler, being first duly sworn, deposes and says that the record in this cause is incorrect in a material matter, in this, to wit:

That the bill of exceptions shows that Talbot, the plaintiff below,

did not take care of the cattle mentioned in the same for the full time mentioned in and required by the contract set forth in said bill of exceptions; that the record makes it appear that the appellee did not commence the care of the cattle until the 7th day of December, A. D. 1870, and only continued such care until Oct. 5th, 1872.

Affiant further says that he was one of the attorneys engaged
170 in the trial of the case below; that he was present during the whole trial, and heard all the evidence in the same, and that the evidence showed that the appellee commenced to take care of the cattle on the day the contract was made, and that he continued the said care and service until the 5th day of December, A. D. 1872, being the full time mentioned in and required by said contract; and that it was not claimed by the appellant or his attorney on the trial of this cause below that the appellee had failed to comply with the contract in that respect.

Affiant further states that he did not discover the said error and mistake until after the appellant caused his brief to be filed, and that this is the first session of the court since he discovered said mistake.

HUGH BUTLER.

Subscribed and sworn to before me this 18th day of December, A. D. 1874.

{ SEAL SUPREME COURT. } JOHN W. WEBSTER, *Clerk.*

171 (Endorsed:) G. D. No. 136. Term No. 22. George C. Beckwith, appellant, vs. Chalmers W. Talbot, appellee. Affidavit. Filed March 18th, 1874. John W. Webster, clerk.

And afterwards on, to wit, the twenty-fifth day of March, A. D. 1874, the same being one of the regular days of the February term, A. D. 1874, of the supreme court of the Territory of Colorado, the following proceedings were had in the above-entitled cause in said court and entered of record, to wit:

GEORGE C. BECKWITH, APPELLANT, *vs.* CHALMERS W. TALBOT, APPELLEE. } No. 136. Appeal from district court, Pueblo County.

At this day comes the said appellant, by T. M. Patterson, esq., and Mess'rs Charles & Phelps, his attorneys, and the said appellee by Hugh Butler, esq., his attorney, also comes, and thereupon this cause
172 comes on to be heard upon the motion of said appellee to continue this cause so as to enable the said appellee to move the court below to amend the bill of exceptions herein; and the same was argued by counsel and submitted to the consideration and judgment of the court, and judgment is reserved until another day.

And afterwards on, to wit, the thirtieth day of March, A. D. 1874, the same being one of the regular days of the February term, A. D. 1874, of the supreme court of the Territory of Colorado, the following proceedings were had in the above-entitled cause in said court and entered of record, to wit:

GEORGE C. BECKWITH, APPELLANT, *vs.* CHALMERS W. TALBOT, APPELLEE. } No. 136. Appeal from district court, Pueblo County.

At this day comes the said appellant, by T. M. Patterson, esq., and

Mess'rs Charles & Phelps, his attorneys, and the said appellee by
173 Hugh Butler, esq., his attorney, also comes, and this cause coming on again to be heard upon the motion of said appellee to continue this cause so as to enable the said appellee to move the court below to amend the bill of exceptions herein; and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the court, it is ordered by the court that this cause stand over until the adjourned session of this court to enable the said appellee to apply to the court below to amend the bill of exceptions herein.

And afterwards on, to wit, the fifteenth day of February, A. D. 1875, the same being one of the regular days of the February term, A. D. 1875, of the supreme of the Territory of Colorado, the following proceedings were had in the above-entitled cause in said court and entered of record, to wit:

G. D. No. 136. Term No. 22.

GEORGE C. BECKWITH, APPELLANT,
vs.
CHALMERS W. TALBOT, APPELLEE. } Appeal from district court, Pueblo County.

174 At this day, on motion of the appellee herein, it is ordered by the court that the said appellee be at liberty to move for leave to file a transcript of the record of certain proceedings had herein, in the said district court, since the giving of the judgment aforesaid in the said district court, as it is said, upon cause shown, on or before Thursday, the eighteenth day of February, A. D. 1875, at two o'clock in the afternoon.

And afterwards on, to wit, the eighteenth day of February, A. D. 1875, the same being one of the regular days of the February term, A. D. 1875, of the supreme court of the Territory of Colorado, the following proceedings were had in the above cause in said court and entered of record, to wit:

136. 22.

GEORGE C. BECKWITH, APPELLANT,
vs.
CHALMERS W. TALBOT, APPELLEE. } Appeal from district court, Pueblo County.

At this day comes the said appellant, by T. M. Patterson, esq.,
175 and Mess'rs Charles & Phelps, his attorneys, and the said appellee by Hugh Butler, esq., his attorney, also comes, and this cause comes on to be heard upon the motion of said appellee for leave to file a supplemental record; and it is ordered by the court that the said appellee file his supplemental record herein at this time; which is accordingly done.

And afterwards on, to wit, the same day, in open court, in compliance with the foregoing order, the said appellee filed in the office of the clerk of said supreme court his amended record; which is in words and figures as follows, to wit:

TERRITORY OF COLORADO,
County of Pueblo, ss:

Pleas before the honorable Moses Hallett, chief-justice of the supreme

court of Colorado Territory and judge of the district court of the third judicial district of said Territory, within and for the county of
176 Pueblo, and at the June term, A. D. 1874, of said court begun and held at the court-house of said Pueblo County, in the city of Pueblo, in the county and Territory aforesaid, on Tuesday, the second day of June, in the year of our Lord one thousand eight hundred and seventy-four.

Present, Hon. Moses Hallett, judge, presiding; John W. Henry, district attorney of the said third judicial district; Geo. A. Bute, clerk of said court; Abe R. Ellis, sheriff of Pueblo County.

Be it remembered that on the twelfth day of June, in the year of our Lord one thousand eight hundred and seventy-four, the plaintiff, by his attorney, Wilbur F. Stone, filed in the clerk's office of said court a certain notice; which, with the affidavit of service endorsed thereon, is in words and figures as follows, to wit:

TERRITORY OF COLORADO,
County of Pueblo, ss:

In the supreme court of the Territory of Colorado.

GEORGE C. BECKWITH, PL'FF IN ERROR, *vs.* CHALMERS W. TALBOT, DEF'T IN ERROR. } Error to district court of Pueblo County.

177 To George C. Beckwith, plaintiff in error in the above-entitled cause:

You are hereby notified that Chalmers W. Talbot, by his counsel, will make application to the honorable Moses Hallett, chief-justice of the supreme court and judge of the district court of the county of Pueblo, at the June term, 1874, of said court, at Pueblo, in the county aforesaid, on the twelfth day of June, A. D. 1874, upon the incoming of the court upon said day, or so soon thereafter as counsel can be heard, to amend the bill of exceptions in said cause in respect to the evidence as to the time of the commencement and the expiration of the contract sued upon, and the service of the said Chalmers W. Talbot thereunder, when you can appear in person or by counsel and resist said application if you desire.

Yours, &c.,

WILBUR F. STONE,
Of Counsel for Chalmers W. Talbot.

Dated at Pueblo, Colorado, June 2d, A. D. 1874.

And the affidavit of service endorsed thereon is in words and figures as follows, to wit:

178 "Served the within notice by delivering a true copy thereof to George C. Beckwith this second day of June, A. D. 1874.

"WILBUR F. STONE.

"Sworn to and subscribed before me this 12th day of June, A. D. 1874.

"GEO. A. BUTE, *Clerk.*"

And upon the same twelfth day of June, in the year of our Lord one thousand eight hundred and seventy-four, the plaintiff, by his attorney,

Wilbur F. Stone, filed in said clerk's office a certain motion to amend bill of exceptions, with a certain affidavit thereunto annexed; which said motion and affidavit are in words and figures following, to wit:

TERRITORY OF COLORADO,
County of Pueblo, ss:

In the district court of the 3d judicial district in and for the county of Pueblo, of the June term, A. D. 1874.

CHALMERS W. TALBOT, PL'FF,
vs.
GEORGE C. BECKWITH, DEF'T. } Motion to amend bill of exceptions.

Comes the said Chalmers W. Talbot, plaintiff in the above-entitled cause, by Thomas Macon, Hugh Butler, and Wilbur F. Stone, his
179 counsel, and moves the court here that the bill of exceptions of the defendant heretofore signed and sealed in said cause be amended in the following particular, to wit:

That the words "I continued this care from Dec. 7, 1870, to Oct. 5, 1872," which words are contained in the last two lines of the first folio of said bill of exceptions, be amended to read as follows, to wit, "I continued this care from October 7, 1870, to December 5, 1872," for the reason that the said words so contained in said bill of exceptions as aforesaid are not the exact words given in testimony in the said cause upon the trial thereof, and were inserted in said bill of exceptions by mistake and oversight of counsel in said cause; but that the words last above quoted, to wit, "I continued this care from October 7, 1870, to December 5, 1872," are the true and correct words which were given in evidence at the trial aforesaid, and should therefore of right have been so inserted in said bill of exceptions, as will more fully appear by reference thereto and to the affidavit hereunto annexed.

By THOMAS MACON,
HUGH BUTLER, AND
WILBUR F. STONE,
Counsel for Plaintiff.

180 A certain affidavit annexed unto said motion and filed in said clerk's office on the same twelfth day of June, A. D. one thousand eight hundred and seventy-four, is in words and figures as follows, to wit:

TERRITORY OF COLORADO,
County of Pueblo, ss:

CHALMERS W. TALBOT, PL'FF,
vs.
GEO. C. BECKWITH, DEF'T. } In district court of Pueblo County.

Wilbur F. Stone, being duly sworn, says that he was one of the counsel for the plaintiff, Chalmers W. Talbot, in the above-entitled suit at the December term of this court, 1873, and that upon the trial of said suit at said term the said plaintiff was called as a witness in the case and then and there gave his testimony, and among other things relating to the subject-matter of the suit gave as evidence and swore that on the second day of October, 1870, he entered into a contract with the de-

fendant and his two sons to take charge of and herd cattle until the fifth of December, 1872, and that he, the plaintiff, did so herd and take care of the defendant's cattle between the said dates.

That in giving in said testimony the plaintiff used the follow-
181 ing words, to wit, "I continued this care from October seventh 1870, to December fifth, 1872, inclusive;" and that the said witness did not at any time state upon said trial that he exercised this care and continued it from December seventh, 1870, to October fifth, 1872; that what was stated by the witness as aforesaid, to wit, that he performed services in taking care of the cattle in question from October 7th, 1870, to December 5th, 1872, was a fact which was sworn to positively by the said witness, and was at no time denied during said trial, nor was it at any time in said trial a question in dispute.

This affiant states that, as counsel aforesaid, he was present and took full notes of the testimony in the case at the trial, and that by a slip of the pen in taking down the testimony of the said witness in the particular above referred to that he, this affiant, transposed the months October and December simply; this making it appear that the witness said, "I continued this care from from December 7th, 1870, to October 5th, 1872," when in truth it was intended and should have been written
182 down *to* this affiant as it was stated by the witness, to wit, "I continued this care from October 7th, 1870, to December 5th, 1872."

That afterwards, when the said bill of exceptions was preferred by M'r Patterson and M'r Thatcher, of counsel for the defendant, the said words contained in the notes of testimony of this affiant were incorporated into the said bill, to wit, at the foot of the first folio of said bill; that these words thus were made a part of said bill of exceptions by oversight, mistake, and inadvertance of the said counsel and of this affiant, and that this mistake was not discovered until the cause came up for hearing in the supreme court upon the writ of error and bill of exceptions.

WILBUR F. STONE.

Sworn to and subscribed before me this twelfth day of June, 1874.
GEO. A. BUTE, *Clerk.*

And on the same twelfth day of June, in the year of our Lord one thousand eight hundred and seventy-four, the defendant, by his attorney,
J. Q. Charles, filed in said clerk's office a certain affidavit, which
183 is in words and figures following, to wit:

TERRITORY OF COLORADO,
County of Pueblo:

In the district court of the 3d judicial district in and for said county, June term, 1874.

GEORGE C. BECKWITH }
ats.
CHALMERS W. TALBOT. }

Thomas M. Patterson, being first duly sworn, upon his oath says that he was one of the attorneys for appellant, George C. Beckwith, in above-entitled cause, and that he assisted in preparing the bill of exceptions in said cause.

That it is the recollection of affiant that the said bill of exceptions was prepared principally from the notes of Wilbur F. Stone, one of the attorneys for appellee in the trial of said cause in the district court of the third judicial district of the Territory of Colorado, sitting in and for the county of Pueblo, and which notes of evidence were taken by said Wilbur F. Stone on the trial of said cause.

That the portion of said bill of exceptions claimed to be erroneous is, as affiant recollects and now believes to be true, substantially as it appeared in the said notes of the testimony taken as aforesaid by the said Wilbur F. Stone at the trial aforesaid, both as to the time when the
184 contract was commenced to be performed by said appellee and when work and labor ceased under it.

That affiant was not of counsel upon said trial of said cause, and only speaks now of his recollection of the statements contained in said notes of the evidence taken by said Wilbur F. Stone.

THO'S M. PATTERSON.

Subscribed and sworn to before me this 10th day of June, A. D. 1874.

JOSEPH R. MCCUTCHEON, NOTARIAL SEAL. ARAPAHOE COUNTY, COLO.

JOSEPH R. McCUTCHEON, *Notary Public.*

And afterwards, and on the same twelfth day of June, in the year of our Lord one thousand eight hundred and seventy-four, the same being one of the days of said June term, 1874, of said court, the following, among other proceeding', were had in said court, to wit:

CHALMERS W. TALBOT *vs.* GEORGE C. BECKWITH. } Assumpsit.

Now, on this day comes the said Chalmers W. Talbot, by Wil-
185 bur F. Stone, his attorney, and moves the court to amend the bill of exceptions heretofore and at the last term of this court filed in this cause, as follows:

That the words "I continued this care from December seventh, one thousand eight hundred and seventy, to October fifth, one thousand eight hundred seventy-two," which words are contained in the last two lines of the fourth folio of said bill of exceptions, be amended to read as follows, to wit: "I continued this care from October seventh, one thousand eight hundred and seventy, to December fifth, one thousand eight hundred and seventy-two."

And the said defendant, by J. Q. Charles, his attorney, also comes; and the allegations and arguments of the parties, by their said counsel, being heard, and now here by the court seen and fully understood, it is considered by the court that the said motion be allowed, and that the said bill of exceptions be, and the same is hereby, amended in manner and form and to the extent and with the effect aforesaid.

TERRITORY OF COLORADO,
County of Pueblo, ss:

I, Geo. A. Bute, clerk of the district court of the third judi-
186 cial district of Colorado Territory, within and for the county of Pueblo, do hereby certify the above and foregoing to be a true, perfect, and complete copy of a certain notice, a motion to amend bill of exceptions, two affidavits, and the order of the court in that behalf en-

tered upon the records of said court in a certain cause lately pending in said court, wherein Charles W. Talbot is plaintiff and George C. Beckwith is defendant.

Witness my hand and the seal of said court hereunto affixed this fifteenth day of February, A. D. 1875.

{ SEAL DISTRICT COURT PUEBLO COUNTY. } GEO. A. BUTE, *Clerk.*

(Endorsed:) G. D. No. 136. Term No. 22. George C. Beckwith, appellant, vs. Chalmers W. Talbot, appellee. Amended record. Filed February 18th, 1875. Jno. W. Webster, clerk.

And afterward, to wit, on the nineteenth day of February, A.
187 D. 1875, there was filed in the office of the clerk of the supreme court, by the attorneys for appellant, their motion to strike amended record from the files; which said motion is in words and figures as follows, to wit:

TERRITORY OF COLORADO, *ss:*

In the supreme court of said Territory, of the February term, A. D. 1875.

GEORGE C. BECKWITH }
vs.
CHALMERS W. TALBOT. }

Comes now the appellant, by Charles & Phelps and Patterson & Thomas, his attorneys, and moves the court to strike from the records of said cause the amended record of the proceedings in the court below.

And the appellant shows to the court the following reasons in support of said motion:

First. Because the judge of the district court has no power to amend the bill of exceptions in the cause after the time given for its preparation and tendering for signature by said district court had expired, and because said judge or court had no power to amend said bill of exceptions after the same had been signed by the district judge and
188 filed in the office of the clerk of the district court and a copy of the same lodged in the clerk's office of this court duly certified.

Second. Because in his application to amend said bill of exceptions the appellee does not show that there is anything in the record below by or from which the original bill of exceptions now on file could be amended; and also because there was no record of proceedings in the court below by or from which the amendment could be made.

Third. Because the said amended bill of exceptions was amended in the month of June, A. D. 1874, and the same was not filed in this cause in this court until after the time fixed by the statutes, and by the court extended to Monday, Feb'y 15th, 1875, had expired.

Fourthly. Because the amended record is incomplete in this, to wit, that at the time of the granting of the order by the district court of Pueblo County allowing said amendment, appellant's counsel prepared and tendered to the said court a bill of exceptions to the granting
189 of the motion for said amendment; which said bill of exceptions was duly signed by the judge of said court, and thereby became a part of the record. Yet the same does not appear in said amended record or a part thereof.

Fifth. And for other good and sufficient reasons.

By CHARLES & PHELPS,
PATTERSON & THOMAS,
For Appellant.

(Endorsed:) G. D. No. 136, term No. 22. George C. Beckwith vs. Chalmers W. Talbot. Motion to strike amended record from the files. Filed February 19, 1875. Jno. W. Webster, clerk. Charles & Phelps, Patterson & Thomas for appellant.

And afterwards, on, to wit, the twentieth day of February, A. D. 1875, there was filed in the office of the clerk of the supreme court of Colorado a stipulation in writing, which is in words and figures as follows, to wit:

TERRITORY OF COLORADO:

190 In the supreme court, February term, 1875.

GEORGE C. BECKWITH, APPELLANT,
vs.
CHALMERS W. TALBOT, APPELLEE.

It is hereby stipulated, admitted, and agreed by and between the parties to this cause, by their respective attorneys, that at the time of the granting of the motion of the appellees to amend the bill of exceptions herein by the district court of the third judicial district of the Territory of Colorado, sitting within and for the county of Pueblo, at the June term thereof, A. D. 1874, the appellant, by his counsel, John Q. Charles, esq., prepared a bill of exceptions to the rulings of said court in granting said motion, and tendered the same to the judge of said court for signing and sealing; and that the said bill of exceptions to said ruling were by the judge of said court then and there signed and sealed.

That, from inadvertence or some other cause, the said bill of exceptions has been omitted, and does not appear in the transcript of
191 said amended record filed in said cause.

Therefore, for the prevention of delay necessarily attendant upon the acquisition of a transcript of the amended record containing said bill of exceptions, it is hereby agreed that the same may be considered as if the same had been incorporated in the amended record filed herein, and that said exceptions were based on these grounds, viz:

That the appellant, by his counsel, opposed the granting of said motion, because the same was sustained by the affidavit of Wilbur F. Stone, of counsel for appellee, and opposed by affidavit of Thomas M. Patterson, of counsel for appellant, both of which affidavits appear in said amended record; and that from said affidavits and motion no proper showing was made and no sufficient foundation laid for the granting of said motion, the same disclosing no error in the record; and exceptions were taken to the action of the court in overruling said objections and in granting said motion.

CHARLES & PHELPS, PATTERSON & THOMAS,
For Appellant.
HUGH BUTLER,
Att'y for Appellee.

192 (Endorsed:) 136. 22. George C. Beckwith, appellant, vs. Chalmers W. Talbot, appellee. Stipulation. Filed February 20th, 1875. Jno. W. Webster, clerk.

And afterwards, on, to wit, the first day of March, A. D. 1875, the same being one of the regular days of the February term, A. D. 1875, of the supreme court of the Territory of Colorado, the following, among other

proceedings, were had in the above entitled cause in said court and entered of record, to wit:

136. 22.

GEORGE C. BECKWITH, APPELLANT,
vs.
CHALMERS W. TALBOT, APPELLEE.
} Appeal from district court, Pueblo County.

In this cause, it appearing to the court that there is a diminution of the record, inasmuch as a certain bill of exceptions reserved by the defendant to the rulings of the district court of Pueblo County, at the June term thereof, A. D. 1874, has not been transmitted to this court,
193 It is therefore ordered by the court that a writ of certiorari, directed to the clerk of the district court of the third judicial district of Colorado Territory, within and for the county of Pueblo, tested according to law, be issued out of and under the seal of this court, commanding him that, without delay, the said bill of exceptions reserved by the said defendant to the rulings of the said district court of the county of Pueblo at the June term, A. D. 1874, he cause to be transmitted to our supreme court now in session, without any addition, alteration, or diminution whatever, to the end that speedy justice may be done in the premises according to law.

And afterwards, on, to writ, the same first day of March, A. D. 1875, in compliance with the foregoing order, there was issued out of the clerk's office of the supreme court of the Territory of Colorado a writ of certiorari in the above-entitled cause; which said writ, with the return attached to the same, and the endorsements thereon, are in words
194 and figures as follows, to wit:

TERRITORY OF COLORADO,
Supreme Court, ss:

The people of the Territory of Colorado to the clerk of the district court of the third judicial district of the Territory of Colorado, within and for the county of Pueblo, greeting:

Whereas in a certain suit between Chalmers W. Talbot, plaintiff, and George C. Beckwith, defendant, lately depending in the district court of said county, wherein judgment was rendered for the said Chalmers W. Talbot and against the said George C. Beckwith, an appeal was prayed for and obtained by the said George C. Beckwith, who has caused an authenticated copy of the record and proceedings in said suit to be transmitted to the supreme court held at Denver on the second Tuesday of February, A. D. 1874, which said transcript was certified and transmitted by you;

And whereas it appears to the court that said record has been
195 diminished, inasmuch as a certain bill of exceptions reserved by the defendant to the rulings of the district court of the county of Pueblo at the June term thereof, A. D. 1874, has not been sent up, and there is a diminution thereof:

You are therefore hereby commanded that, without delay, the said bill of exceptions reserved by the said defendant to the rulings of the said district court of the county of Pueblo at the June term thereof, A. D. 1874, you cause to be transmitted to the said supreme court now in session, without any addition, alteration, or diminution whatever, to

the end that speedy justice may be done in the premises, according to law, whereof you are in no wise to fail; and send you then and there this writ.

Witness the Hon. Moses Hallett, chief-justice of our supreme court at Denver, this first day of March, A. D. 1875.

[SEAL OF SUPREME COURT.] JNO. W. WEBSTER,
Clerk Supreme Court.

196 On which said writ is the following endorsement:

TERRITORY OF COLORADO,
County of Pueblo:

By virtue of this writ to me directed, I do hereby certify to the justices of said supreme court that, having examined the record and proceedings in the suit of which mention is within made, I find that a certain bill of exceptions reserved by the defendant to the rulings of the district court of said Pueblo County at the June term thereof, A. D. 1874, has been omitted from the record heretofore certified, a transcript of which as fully and entirely as the same remains in my custody of record I do hereby certify and transmit to the said justices at Denver, in said Territory, as within I am commanded.

Pueblo, March 8, 1875.

GEORGE A. BUTE, *Clerk.*

To which said writ of certiorari is attached the following return; which is in words and figures as follows, to wit:

197 TERRITORY OF COLORADO,
County of Pueblo, ss:

Pleas before the honorable Moses Hallett, chief-justice of the supreme court of Colorado Territory and judge of the district court of the third judicial district of said Territory, within and for the county of Pueblo, and at a term of said district court began and held at the court-house in the city of Pueblo, in said Pueblo County and Territory aforesaid, on Tuesday, the second day of June, in the year of our Lord one thousand eight hundred and seventy-four.

Present, Hon. Moses Hallett, judge of said court; John W. Henry, esq., district attorney of said third judicial district of said Territory; Geo. A. Bute, clerk of said court; Abe R. Ellis, sheriff of said Pueblo County.

Be it remembered that heretofore, to wit, on the twelfth day of June, in the year of our Lord one thousand eight hundred and seventy-
198 four, the same being one of the days of said June term, A. D. 1874, of said court, George C. Beckwith, by J. Q. Charles, his attorney, filed in the clerk's office of said court a certain bill of exceptions on motion, which is in words and figures following, to wit:

TERRITORY OF COLORADO,
County of Pueblo:

In the district court of the third judicial district of Colorado Territory, within and for the county aforesaid, of the June term thereof, A. D. 1874.

GEORGE C. BECKWITH
ats.
CHALMERS W. TALBOT.

Be it remembered that on this the 12th day of June, A. D. 1874, said day being one of the days of the June term of said court, A. D. 1874, came on to be heard the motion of the said plaintiff, filed in the above-entitled cause on the 12th day of June, A. D. 1874, to amend the bill of exceptions heretofore signed and sealed by the judge of this court, and filed in said cause; which said motion is in words and figures
199 following, to wit:

TERRITORY OF COLORADO,
County of Pueblo, ss:

In the district court of the 3d judicial district in and for the county of Pueblo, of the June term, 1874.

CHALMERS W. TALBOT
vs.
GEORGE C. BECKWITH. } Motion to amend bill of exceptions.

Comes the said Chalmers W. Talbot, plaintiff in the above-entitled cause, by Thomas Macon, Hugh Butler, and Wilbur F. Stone, his counsel, and move the court here that the bill of exceptions of the defendant heretofore signed and sealed in said cause be amended in the following particular, to wit:

That the words "I continued this care from Dec. 7th, 1870, to October 5th, 1872," which words are contained in the last two lines of the first folio of said bill of exceptions, be amended to read as follows, to wit: "I continued this care from October 7th, 1870, to December 5th, 1872," for the reason that the said words so contained in said bill of exceptions as aforesaid are not the exact words given in testimony
200 in the said cause upon trial thereof, and were inserted in said bill of exceptions by mistake and oversight of counsel in said cause; but that the words last above quoted, to wit, "I continued this care from October 7th, 1870, to December 5th, 1872," are the true and correct words which were given in evidence at the trial aforesaid, and should thereupon of right have been so inserted in said bill of exceptions, as will more fully appear by reference thereto and to the affidavit hereto annexed.

By THOMAS MACON, HUGH BUTLER,
AND WILBUR F. STONE,
Counsel for Plaintiff.

Which said motion was based upon a certain notice and affidavit of service thereof, filed, in said cause therewith, on the said 12th day of June, A. D. 1874; which said notice and affidavit of service thereof are in the words and figures following, to wit:

TERRITORY OF COLORADO,
County of Pueblo, ss:

In the supreme court of the Territory of Colorado.

GEORGE C. BECKWITH, PL'FF IN ERROR,
201 *vs.*
CHALMERS W. TALBOT, DEF'T IN ERROR. } Error to district court of Pueblo County.

To George C. Beckwith, plaintiff in error in the above-entitled cause:

You are hereby notified that Chalmers W. Talbot, by his counsel, will

make application to the honorable Moses Hallett, chief-justice of the supreme court and judge of the district court of the county of Pueblo, at the June term, 1874, of said court, at Pueblo, in the county aforesaid, on the 12th day of June, A. D. 1874, upon the incoming of the court upon said day, or so soon thereafter as counsel can be heard, to amend the bill of exceptions in said cause in respect to the evidence as to the time of the commencement and the expiration of the contract sued upon, and the service of the said Chalmers W. Talbot thereunder, when you can appear in person or by counsel and resist said application if you desire.

WILBUR F. STONE,
Of Counsel for Chalmers W. Talbot.

Dated of Pueblo, Colorado, June 2d, A. D. 1874.

Served the within notice by delivering a true copy thereof to
202 George C. Beckwith this 2d day of June, A. D. 1874, at Pueblo, Colorado.

WILBUR F. STONE.

Sworn to and subscribed before me this 12th day of June, A. D. 1874.
GEORGE A. BUTE, *Clerk.*

In support of which said motion the plaintiff in said cause filed in said cause on said 12th day of June, A. D. 1874, the affidavit of Wilbur F. Stone, esq.; which said last-mentioned affidavit is in words and figures following, to wit:

TERRITORY OF COLORADO,
County of Pueblo, ss:

CHALMERS W. TALBOT, PL'FF,
vs.
GEO. C. BECKWITH, DEF'T. } In the district court of Pueblo County

Wilbur F. Stone, being duly sworn, says that he was one of the counsel for the plaintiff, Chalmers W. Talbot, in the above-entitled suit, at the December term of this court 1873, and that upon the trial of
203 said suit at said term the said plaintiff was called as a witness in the case and then and there gave his testimony, and among other things relating to the subject-matter of the suit gave as evidence and swore that on the 7th day of October, 1870, he entered into a contract with the defendant and his two sons to take charge of and herd cattle until the fifth day of December, 1872, and that he, the plaintiff, did so herd and take care of the defendant's cattle between the said dates.

That in giving his said testimony the plaintiff used the following words, to wit: "I continued this care from October seventh, 1870, to December fifth, 1872, inclusive," and that the said witness did not at any time state upon said trial that he exercised that care and continued it from December seventh, 1870, to October fifth, 1872.

That what was stated by the witness, as aforesaid, to wit, that he performed services in taking care of the cattle in question from October 7th, 1870, to December 5th, 1872, was a fact which was sworn to positively by the said witness, and was at no time denied during said trial, nor was it at any time, in said trial, a question in dispute.

204 This affiant states that, as counsel aforesaid, he was present and took full notes of the testimony in the case at the trial, and that, by a slip of the pen in taking down the testimony of the said witness in the particular above referred to, that he, this affiant, transposed the

months October and December simply, thus making it appear that the witness said "I continued this care from December 7th, 1870, to October 5th, 1872," when in truth it was intended and should have been written down by this affiant as it was stated by the witness, to wit: "I continued this care from October 7th, 1870, to December 5th, 1872."

That afterwards, when the said bill of exceptions was prepared by M'r Patterson and M'r Thatcher, of counsel for the defendant, the said words contained in the notes of testimony of this affiant were incorporated into said the bill to, wit, at the foot of the first folio of said bill: that these words were thus made a part of said bill by oversight, mistake, and inadvertence of the said counsel and of this affiant, and that this mistake was not discovered until the cause came up for hearing in the
205 supreme court upon the writ of error and said bill of exceptions.

WILBUR F. STONE.

Sworn to and subscribed before me this 12th day of June, 1874.

GEORGE A. BUTE,
Clerk.

On behalf of the defendant, George C. Beckwith, there was filed, in opposition to said motion, on the said 12th day of June, A. D. 1874, the affidavit of Thomas M. Patterson, esq., which said last-mentioned affidavit is in words and figures following, to wit:

TERRITORY OF COLORARO,
County of Pueblo:

In the district court of the 3d judicial district in said county, June term, A. D. 1874.

GEORGE C. BECKWITH }
ats. }
CHALMERS W. TALBOT. }

Thomas M. Patterson, being first duly sworn, upon his oath says: That he was one of the attorneys for appellant, George C. Beckwith, in above-entitled cause, and that he assisted in preparing the bill of exceptions in said cause.

206 That it is the recollection of affiant that the said bill of exception was prepared principally from the notes of Wilbur F. Stone, one of the attorneys for appellee in the trial of said cause in the district court of the Territory of Colorado, sitting in and for the county of Pueblo, and which notes of evidence were taken by said Wilbur F. Stone on the trial of said cause.

That the portion of said bill of exceptions claimed to be erroneous is, as affiants recollects and now believes to be true, substantially as it appears in the said notes of the testimony taken as aforesaid by the said Wilbur F. Stone at the trial aforesaid, both as to the time when the contract was commenced to be performed by said appellee and when work and labor ceased under it.

That affiant was not of counsel upon said trial of said cause, and only speaks now of his recollection of the statements contained in said notes of the evidence taken by said Wilbur F. Stone.

THOMAS M. PATTERSON.

Subscribed and sworn to before me this 10th day of June, A.D. 1874.
[SEAL.] JOSEPH R. MCCUTCHEON,
Notary Public.

207 Which said motion was, on the said 12th day of June aforesaid, A. D. 1874, argued by counsel for the parties in said cause; and after said arguments the court thereupon sustained said motion, and permitted said bill of exceptions to be amended as asked in said motion, on the ground and for the reason, as then and there stated by the court, that it appeared from his own notes, taken on the trial of said cause, that the evidence given by said witness Charles W. Talbot should have been inserted in said bill of exceptions, as claimed in said motion, and that his ruling in the premises on this motion was based in part upon the fact that his notes taken at the time of trial showed that the evidence given at the trial was as claimed in and by said motion.

To which ruling of the court, in sustaining said motion and permitting said bill of exceptions to be amended as therein asked, the said defendant then and there excepted.

And inasmuch as the matters aforesaid do not appear of record, the counsel for the said defendant presents this bill of exceptions, and prays that the same may be signed and sealed by the court and
208 made part of the record in said cause; and it is done accordingly.

[SEAL.] (Signed) MOSES HALLETT,
C. J. & Judge, etc.

TERRITORY OF COLORADO,
County of Pueblo, ss:

I, George A. Bute, clerk of the district court of the third judicial district of Colorado Territory, within and for the county of Pueblo, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of a certain bill of exceptions on motion filed in my office by the defendant in a certain cause lately pending in said court, on the law side thereof, wherein Chalmers W. Talbot is plaintiff and George C. Beckwith is defendant.

In witness whereof I have hereunto affixed the seal of said court and set my hand this 8th day of March, A. D. 1875.

{ SEAL DISTRICT COURT } GEORGE A. BUTE,
{ PUEBLO COUNTY. } *Clerk.*

209 (Endorsed:) 136. 22. George C. Beckwith, appellant, vs. Chalmers W. Talbot, appellee. Writ of certiorari and return. Filed March 9th, 1875. Jno. W. Webster, clerk.

And afterwards, on, to wit, the fifteenth day of March, A. D. 1875, the same being one of the regular days of the February term, A. D. 1875, of the supreme court of the Territory Colorado, the following proceedings were had in said cause and entered of record, to wit:

136. 22.

GEORGE C. BECKWITH, APPELLANT, *vs.* CHALMERS W. TALBOT, APPELLEE. } Appeal from district court Pueblo County.

At this day comes the said appellant, by Messrs. Charles & Phelps and T. M. Patterson, esq., his attorneys, and the said appellee by Hugh Butler, esq., his attorney, and this cause coming on to be heard
210 upon the motion of said appellant to strike the amended transcript of the record from the files of this court, and the same having been argued by counsel and submitted to the consideration and

judgment of the court, and it is ordered by the court that said motion be denied. And it is further ordered by the court that this cause be set for hearing on Thursday, the eighteenth day of March next ensuing.

And afterwards, on, to wit, the eighteenth day of March, A. D. 1875, the same being one of the regular days of the February term, A. D. 1875, of the supreme court of the Territory of Colorado, the following proceedings were had in said cause and entered of record, to wit:

136. 22.

GEORGE C. BECKWITH, APPELLANT, *vs.* CHALMERS W. TALBOT, APPELLEE. } Appeal from district court Pueblo County.

At this day comes the said appellant, by Messrs. Charles & Phelps, and T. M. Patterson, esq., his attorneys, and the said appellee,
211 by Hugh Butler, esq., his attorney, also comes; and this cause coming on to be heard, was argued by counsel and submitted to the consideration and judgment of the court; and judgment thereon is reserved until another day.

And afterwards, on, to wit, the twenty-seventh day of March, A. D. 1875, the same being one of the regular days of the February term, A. D. 1875, of the supreme court of the Territory of Colorado, the following proceedings were had in said cause in said court and entered of record, to wit:

136. 22.

GEORGE C. BECKWITH, APPELLANT, *vs.* CHALMERS W. TALBOT, APPELLEE. } Appeal from district court Pueblo County.

Now, on this day comes the said appellant, by T. M. Patterson, esq., and Messrs. Charles & Phelps, his attorneys, and the said appellee, by Hugh Butler, esq., his attorney, also comes.

And this cause comes on to be heard as well upon the transcript of judgment and other proceedings had in the said district court for
212 the county of Pueblo as also upon the matters herein assigned for error.

The same having been argued by counsel, and it appearing to the court that there is no error in the record and proceedings aforesaid, nor in giving judgment aforesaid, it is considered by the court that the judgment, in form aforesaid given, be in all things affirmed and stand in full force and effect, that the opinion of the court filed herein be recorded, and that said appellee do have and recover of and from the said appellant his costs and charges in this behalf expended, to be taxed, and that he have execution therefor.

And afterwards, on, to wit, the second day of April, A. D. 1875, there was filed in the office of the clerk of the supreme court of the Territory of Colorado a writ of error in the above cause; which original writ of error and endorsements thereon is hereto attached and is in words and figures as follows, to wit:

213 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Colorado, greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court before you between George C. Beckwith and Chalmers W. Talbot, a manifest error hath happened, to the great damage of the said George B. Beckwith, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United State, together with this writ, so that you have the same at Washington on the second Monday of October next, in said supreme court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of
214 the said Supreme Court, the fifth day of October, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] JNO. W. WEBSTER,
Clerk Supreme Court, Colorado Territory.

214½ (Indorsed:) George C. Beckwith vs. Chalmers W. Talbot. Writ of error. Filed April 2, 1875. Jno. W. Webster, clerk.

215 And afterwards on, to wit, the third day of April, 1875, there was filed in the office of the clerk of the supreme court of the Territory of Colorado a citation in the above cause, which original citation and endorsements thereon is attached and is in words and figures as follows, to wit:

216 THE UNITED STATES OF AMERICA, *greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Colorado, wherein George C. Beckwith is plaintiff in error and your are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why justice should not be done to the parties in that behalf.

Witness the honorable Moses Hallett, chief-justice of the Territory of Colorado, this third day of April, in the year of our Lord one thousand eight hundred and seventy-five.

MOSES HALLETT,
C. J. Sup. Court, Col. Ter.

On this third day of April, in the year of our Lord one thousand eight hundred and seventy-five, personally appeared before me Charles S. Thomas, the subscriber, and makes oath that he delivered a true copy of the within citation to Hugh Butler, the attorney of record of
217 and for Chalmers W. Talbot, the defendant in error in the cause in which the within citation is issued, and that the service of the same was acknowledged.

CHA'S S. THOMAS.

Subscribed and sworn to before me this third day of April, A. D. 1875.

JNO. W. WEBSTER,
Clerk Supreme Court, Colorado Territory.

Service of the within admitted this 3rd day of April, A. D. 1875.
HUGH BUTLER.

(Indorsed:) George C. Beckwith vs. Chalmers W. Talbot. Citation. Filed April 3d, 1875. Jno. W. Webster, clerk.

218 And afterwards on, to wit, the third day of April, A. D. 1875, there was filed in the office of the clerk of the supreme court of the Territory of Colorado a bond in the above cause, which, together with the endorsements thereon, is in words and figures as follows, to wit:

Know all men by these presents that we, George C. Beckwith, Job A. Cooper, and Peter Winne are held and firmly bound unto Chalmers W. Talbot in the full and just sum of six thousand dollars, to be paid to the said Chalmers W. Talbot, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this thirtieth day of March, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas lately, at a term of the supreme court of the Territory of Colorado, in a suit depending in said court between the above-
219 bounden George C. Beckwith and the said Chalmers W. Talbot, and the said George C. Beckwith having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Chalmers W. Talbot, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such, that if the said George C. Beckwith shall prosecute his writ of error to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

GEORGE C. BECKWITH. [SEAL.]
JOB A. COOPER. [SEAL.]
PETER WINNE. [SEAL.]

TERRITORY OF COLORADO,
County of Arapahoe, ss:

220 Job A. Cooper, being first duly sworn, deposes and says, he is worth in property, real and personal, the sum of six thousand dollars, over and above all his just debts and outstanding liabilities.

JOB A. COOPER.

Subscribed and sworn to before me this third day of April, 1875.

MOSES HALLETT,
C. J. Sup. Court, C. T.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

Peter Winne, being first duly sworn, deposes and says, he is worth in

property, real and personal, the sum of six thousand dollars, over and above all his just debts and outstanding liabilities.

PETER WINNE.

Subscribed and sworn to before me this third day April, 1875.

MOSES HALLETT,
C. J. Supreme Court, Col. Ter.

221 Taken and appoved by me this 3d day of April, A. D. 1875.

MOSES HALLETT,
C. J. Sup. Court, Col. Ter.

(Endorsed:) 136. 22. George C. Beckwith vs. Chalmers W. Talbot. Bond. Filed April 3d, 1875. Jno. W. Webster, clerk.

And on the 15th day of March, A. D. 1875, there was filed in the office of the clerk of the supreme court of the Territory of Colorado the opinion of the court upon the motion to strike the amended record from the files, which is hereto annexed to the above record, in accordance with amendments to rule 8th of the Supreme Court of the United States, to be transmitted herewith, and is in words and figures as follows, to wit:

In the supreme court, February term, 1875.

GEORGE C. BECKWITH
vs.
222 CHALMERS W. TALBOT. } Appeal from district court of Pueblo County.

This cause having been continued at the last term to enable appellee to move the district court for leave to amend the record of the bill of exceptions, M'r Butler now, at this term, filed a transcript of such amendment made at the June term, A. D. 1874, of the district court.

Thereupon M'r Phelps, of counsel for appellant, moved to strike the transcript of such amendment from the files, upon the ground that the district court had no authority to allow such amendment at a term subsequent to that in which the cause was tried, there being nothing in that court by or from which the amendment could be made. The transcript of the amendment did not show an exception to the ruling of the district court in allowing the amendment, but counsel stipulated that such exception was taken, and that the action of the court was based upon certain affidavits found in the transcript.

223 The court, however, ordered a certiorari to the district court to bring up the record of that exception, which being now returned into this court with that record,

Per CURIAM. We find upon examining the record of the exception taken to the ruling of the court below that the amendment was allowed upon minutes of the trial kept by the judge of that court; and, therefore, it is not true, as alleged by counsel, that there was no memorandum in writing upon which the amendment could be made. M'r Stone, who took minutes of the testimony upon the trial below, testifies that, by a slip of the pen, he recorded the testimony as it is given in the original bill of exception, but that the witness did in fact testify as stated in the amendment, and his testimony was supported by the notes of the judge who sat at the trial.

It is very clear that a mistake was made in preparing the bill of ex-

ceptions, and as the evidence of the fact was still in existence, we think the court might well allow the amendment to be made. (Doane
224 vs. Glenn, 1st Colo., 454.) As to the notice of the application for leave to amend, no objection to the sufficiency of it was made in the court below, and therefore none should be heard in this court.

The motion to strike from the files will be denied.

(Endorsed:) Beckwith vs. Talbot. Opinion upon motion to strike amended record from the files. Recorded. Filed March 15th, 1875. Jno. W. Webster, clerk.

And afterwards, on, to wit, the twenty-seventh day of March, A. D. 1875, there was filed in the office of the clerk of the supreme court of the Territory of Colorado the opinion of the court upon final hearing of the above cause, which is hereto annexed in accordance with amendment to Rule 8th of the Supreme Court of the United States, to be transmitted herewith, and is in words and figures as follows, to wit:

225 In the supreme court, February term, 1875.

GEO. C. BECKWITH
vs.
CHALMERS W. TALBOT. } Appeal from dist. court, Pueblo County.

BRAZEE, *A. J.:*

This is an action of assumpsit commenced by summons on the 12th of May, 1873, by the appellee against the appellant. A declaration was filed on the 16th of May, 1873, containing four counts, three of which were special counts for the breach of an express contract, and the fourth a common count for work and labor. The first and third counts were held bad on demurrer.

On the 31st of May, 1873, the plaintiff filed an amended declaration which contained only two counts, both special, for the breach of an express contract, to which the defendant plead the general issue. On the 12th of June, 1873, the plaintiff obtained leave to file and filed a second amended declaration containing only two counts, both special, for the breach of the contract hereinbefore referred to, to which the defendant plead the general issue, with notice of special matter, to the effect that the subject-matter of the plaintiff's special claim was a partner-
226 ship transaction between the plaintiff, Elton T. Beckwith and Edwin F. Beckwith, and appellant, and the same was unsettled.

The trial below proceeded upon the theory that the common count was in the declaration; but under the view we take of this case, it is wholly immaterial whether it stood with the special counts or had been superseded by them.

The agreement declared on in the special counts was produced by the defendant at the trial, and by him was put in evidence, and is as follows:

WET MOUNTAIN VALLEY, *Oct. 7th*, 1870.

This is to certify that the undersigned have taken two thousand two hundred and five head of cattle, valued at thirty-six thousand six hundred and eighty-one dollars and sixty cents, on shares, from Geo. C. Beckwith, time to expire on the fifth day of December, one thousand eight hundred and seventy-two, then Geo. C. Beckwith to sell the cattle

and retain the amount the cattle are valued at above, of the amount the cattle sell at over and above the said valuation, Geo. C. Beckwith to retain one-half and the other half to be equally divided between C. W. Talbot, Elton T. Beckwith, and Edwin F. Beckwith.

(Signed) C. W. TALBOT.
ELTON T. BECKWITH.
EDWIN F. BECKWITH.

227 Elton T. Beckwith and Edwin F. Beckwith were the sons of Geo. C. Beckwith, one of whom, at the defendant's request, wrote the agreement, and after it was signed by the three other parties to it, the defendant took possession of the document and retained it until the time it was produced and put in evidence on the trial by him. Four letters from the defendant to the plaintiff were put in evidence, all of them referring to the cattle, and two of them to the agreement, and are as follows:

Letter No. 3.

DENVER, *Sept.* 21, 1872.

M'r TALBOT:

SIR: On my arrival from the mountains I received your letter. As I have wrote you before, every day I see parties here that is offering their cattle very low, as the hard winter has discouraged them, and that is the cause that cattle is so very low. There is now in the cattle in the valley about $25,000, and I am frank to say that as the market looks they cannot be sold for more than that sum.

I have used every exertion for the last three months to sell. I engaged a man to sell them, and agreed to give him $1,000 to make sale of them, and he has written east, and advertised, and tried to sell, without success.

You suggest giving you a part of the cattle. That is entirely
228 outside of the agreement. Also, where would be the interest put in the cattle coming from, and also Elton and Edwin would be glad to do the same; but at that rate I would not get my money back I put into the cattle.

The cattle must be sold and settled up according to the agreement. I will do everything I can to sell at the best advantage, and you shall have every chance to get a purchaser for the cattle, so as to make the most out of them. I shall not give up the range, as when the cattle is sold I can buy 3,000 head of stock-cattle, from four-year-olds, cows, two-year-olds, and yearlings, for $12 a head, mostly large cattle; and I shall do so and put them on a range, and see if I can't make up part of what I shall lose in the cattle we now have.

You shall have no chance to complain in my keeping up to the agreement, as I shall strictly, although I have heard you have made complaints to parties, which I think is very unfair, and the parties you told so said so too. Therefore I am determined to give you no reasonable cause of complaint, although I shall be willing to leave it to any person.

If, on the other hand, I had not reason to complain, when you
229 worked yourself out of coming up with the cattle while we were out in sleet and rain, and out all night in rain-storms, and running our horses, while they lay down in the road and died, you was to home taking your comfort. I think that looks little like cause for complaint. Also, you employed the poorest men and boys to herd for you.

I should not of mentioned this, or made any complaint, if I had not

heard of your talk. As there will be a large loss in the cattle to me, I should make the best of it; and as I have reason to believe there will be a big loss in the cattle falling short in count, by losing, strays, and stealing, and other ways.

Yours, respectfully,

GEO. C. BECKWITH.

Letter No. 4.

DENVER, *Nov. 10th*, 1872.

M'r TALBOT:

SIR: At first I thought it useless to answer your letter, as I am bound by the agreement to sell the cattle in a very short time; that to commence pulling them out, and of the most desirable in the heard; and suppose I sold this thirty, then thirty and fifty more, until all the most desirable was sold, and at last, which would probably be months,
230 and the balance would not bring enough to make the $31,000 I am offered. Who would be the greatest loser then? I would lose $30 to your $1; and by your movements when I was in the valley that you was the only one that was interested in the cattle.

However, I have prolonged my letter. As for setting a price on the cattle, if you had done your duty you would have had the cattle counted, as you agreed to; and as you have seen fit not to perform your part of the contract, the cattle is to be sold as they are, and I see no other way, and as I am advised by the best lawyers here. Not one man in a thousand would have given you the chance that I have done.

I notified you to get a purchaser for the cattle months ago; and what have I received from you in return for my pay? I must say I have never been treated so meanly by a man in my life. My rights was to sell the cattle. Does the agreement say that I was to say anything to you or to any one else? But what next? You quarreled with me because I would not break the agreement and give you the cattle to sell at
231 figures less than I had kept them in Denver for sale. Now I have been offered $31,000 for the cattle. I have written to Edwin, and he will state to you what I wrote to him to say to you.

Yours, in haste,

GEO. C. BECKWITH.

The contract was fully performed by the parties who signed it, by herding the cattle in the Wet Mountain Valley upon the defendant's range, where they were at the time the agreement was entered into, and where they remained after the time therein specified for the fulfillment of the contract had expired. It is here objected to the contract that it was not subscribed by the defendant, the party sought to be charged in this action, and is therefore inadmissible and incompatible as evidence, and of no binding force or validity whatever under the statutes of "Frauds and Perjuries," (sec. 12, R. S. Col. Ter., 339,) which provides that "every agreement that by the terms is not to be performed within one year from the making thereof," unless some note or memorandum thereof be in writing, and subscribed by the party charged therewith, shall be void.

The defendant is not in a position to raise in this court the
232 question of the admissibility of this contract in evidence, for the very good reason that he introduced it in evidence upon the trial. The question as to the validity of contract is one which the appellant is in a position to raise in this court, and is one of serious importance, if

not the controlling question in the case. If the sole evidence of the contract rested in the document signed by Elton T. and Edwin F. Beckwith and the plaintiff, under some of the decisions, the contract would be taken out of the statutes by the full performance of the contract by one of the parties to it; but inasmuch as the authorities are conflicting and nearly equally divided on this question, we do not place our decision upon that ground, but upon another.

It is a well-established rule of law that the note or memorandum evincing the agreement may be on one or many pieces of paper, cotemporaneous, or of different dates. The general rule is thus stated in Brown on Frauds, section 350: "The written memorandum need not be contained in a single paper, but may be made out by comparing and connecting two or any number of papers." Correspondence by
233 letter between the parties is instanced as illustrating the rule, and he says: "A letter or other instrument signed by the proper party may be for this purpose taken in connection with a previous writing not signed."

Under this rule we are to look at the letters of the defendant to the plaintiff, to see whether they are a sufficient note or memorandum of the agreement in writing subscribed by the party charged to validate the agreement in suit. In the letter of July 20th, 1872, this language is used: "You suggest giving you a part of the cattle; that is entirely outside of the agreement." Again: "The cattle must be sold and settled up according to the agreement." Further on: "You shall have no chance to complain in my keeping up to the agreement, as I shall strictly." In his letter of Nov. 10, 1872, he says: "I am bound by the agreement to sell the cattle in a very short time;" & again: "Does the agreement say that I was to say anything to you or any one else?"

As a witness in his own behalf, on direct examination, concern-
234 ing the contract, the defendant testified that the "matter was all talked over, and I thought understood; I said to my son Elton, 'You understand the matter; will you write the contract.' He wrote it, Talbot read and signed it, and then my sons signed it." On his cross-examination he further testified: "After being signed, the contract was delivered to me, and has been in my possession ever since until this trial; it is the contract as we talked it over."

In view of this evidence of the defendant, can there be any doubt as to whether the defendant, the defendant's letters, referred to the agreement signed by the plaintiff and the defendant's two sons on the 7th of October, 1870, which, at the time he wrote the letters, was in the defendant's possession?

It is said in some of the cases that the mutual relations of the writings must appear upon their face, and cannot be shown by parol evidence. This rule is, however, not uniform, (see Lee vs. Mahoney, 9th Iowa,) but whether it is sustained by the weight of authority or not is immaterial in this cause. That rule is applicable, if at all, to cases where the parol evidence to connect the writings is offered by the party
235 seeking to enforce the contract, and objected to by the other side. It can have no application where such evidence is received without objection, much less where the party sought to be charged, as in this case, voluntarily gives the parol evidence which serves to connect the writings, and which, whene connected, evince the contract.

Looking, then, at the agreement or memorandum of October 7, 1870, the defendant's letters and his evidence, there is no doubt that the letters referred to and affirmed that contract, as much as if the defendant

had written thereunder, "I shall strictly keep this agreement on my part," and had then subscribed his name thereto.

We hold, therefore, that the letters referred to the agreement of October 7, 1870, and were such a note or memorandum of the agreement subscribed by the party charged, or takes this contract out of the statutes of Fraud and Perjuries, (12 section,) under the rule recognized and applied in Jackson vs. Lowe, 1st Bingham, 9; Gale vs. Nixon, 6th Cowen, 444-'5; Lee vs. Mahoney, 9th Iowa, 344.

It is claimed by the learned counsel for the appellant that, under the contract, the appellant, appellee, and the two younger Beckwiths
236 became partners, and therefore this action cannot be maintained. "A partnership is a contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them in lawful business, and to divide the profit and bear the loss in certain proportions." "The two leading principles of the contract are a common interest in the stock of the company and a personal responsibility for the partnership engagements," says Kent; and a common title in the partners to the partnership effects is an element of this contract too well known to require more than a mere mention.

Under the agreement in question there was no community of loss; if the cattle which were the subject-matter had died the next day after the agreement was entered into, the whole loss would have fallen upon George C. Beckwith alone.

Neither was there any community of title in the subject-matter; there was no joint ownership in the original herd, nor in the increase thereof, created by the contract, but the title to the herd and the increase thereof remained in the defendant, who alone, under the contract, had the right to dispose of either. Such is the fair inter-
237 pretation of the contract in these respects; and in this construction all the parties seem to have acquiesced. Neither was there any community of expenses, either between the four parties to the contract nor as between the three who were to do the herding for, as appears by the evidence, each of these three paid his own expenses, without contribution from the others.

The contract, then, lacked these essential elements of a partnership, viz, community of loss, community of title, community of expenses, and a common right to dispose of partnership property for the purposes of the partnership. If this contract created a partnership it was an anomalous, abnormal monstrosity, unknown to the law, in which the legal title to the partnership assets, together with all the increase thereof, and the right to dispose of the same vested in one of the partners only, who was in no case to be liable for any of the expenses of the concern.

The next question presented for our consideration is whether the plaintiff and the two younger Beckwiths were jointly interested
238 in the damages which accrued by reason of the non-fulfillment of the contract by the defendant.

We have seen that, as between themselves, there was no joint expenses incurred by these three, each paying his own expenses, and the plaintiff hired herders at his own expense. So far, then, these three parties treated the contract as if their respective interests were several and not joint. If, as alleged in the declaration, the defendant had settled with his two sons for their respective shares, it is clear that in that event the sons would have had no interest in the subject-matter of this action.

Again, supposing the cattle had been sold at the agreed time, at an advance on the original valuation, and the sons had received re-

spectively each his share of the proceeds of the sale, but the defendant had refused to pay the plaintiff anything, could the plaintiff have maintained an action against the sons, jointly or severally, to recover any part of the proceeds which they might have thus respectively received from their father? We think not.

On the whole, upon the face of the contract, and the light
239 thrown upon it by the action of the parties under it, we regard it as an agreement of the defendant to compensate his two sons and the plaintiff respectively by dividing the proceeds of sale, over and above the original valuation, in the manner pointed out by the contract, and the non-fulfillment by the defendant gave the plaintiff a separate cause of action against him. It follows, then, that in any view of the pleadings the contract was properly in evidence and afforded the only basis for damages in case of its non-fulfillment.

Another question is raised in regard to the measure of damages. The rule adopted in the court below was that the increase of the herd in value, if any, afforded the measure of damages, and the court instructed the jury that if the contract was such as the plaintiff claimed, and the cattle were worth more than $36,681.60 at the expiration of the time fixed by the agreement for its fulfillment, and the plaintiff might and could have obtained more than that sum for them
240 at that time, the plaintiff might recover the one-sixth part of the sum which might thus have been obtained after deducting $36,681.60, and this, we think, affords the proper rule for damages in this case so far as it goes.

Another item or element of damages was submitted to the jury, which was, that to the amount which they might find for the plaintiff under the aforesaid rule, they might add interest upon such amount so found by them at the rate of ten per cent. from the 12th day of May, 1873, when the action was commenced, which we think was proper upon authority. In Goddard vs. Foster, (17 Wallace, 123,) which was an action to recover for the value of services in assumpsit upon special promises and common counts, (Id., 128,) the U. S. Supreme Court say: "Beyond all question the plaintiff was entitled to interest from the commencement of the suit," and decided that as to the rate the lex fori is to govern.

The fact that there may be no statute in the place where the transaction takes place does not prevent the recovery of interest. In such a case interest at a reasonable rate, conforming to the custom of
241 the locality will be allowed by way of damages. Young vs. Godbe, (15 Wall., 562.)

If there was error in permitting Talbot, after objections, to testify that the appellant assented to and accepted the terms of the contract of Octo. 7th, 1870, no injury could have possibly resulted to the appellant therefrom, for the appellant, as subsequently appeared, assented to the contract by his letters, which have been referred to, and he testified to the same thing in his own behalf. The evidence so objected to simply went to establish a fact. The existence of which, viz, the assent of the appellant to the contract of Oct. 7th, 1870, there is no dispute between the parties whatever, and no injury could therefore have resulted to the defendant from overruling his objection in this respect.

The tax schedule of the cattle herded under the contract in question was made by Elton Beckwith, who, as appears by his evidence, as well as by the defendant's letter of April 13th, 1871, was authorized to make the same as the basis of assessment and was competent evidence to go to the jury as the act of the defendant by his authorized agent,
242 on the question of the value of the herd.

We find no error in the instructions; they were given in accordance with the views expressed herein. No ground for vacating is shown, and the judgment is accordingly affirmed.

(Endorsed:) 136. Beckwith vs. Talbot. Opinion recorded. Filed March 27, 1875. Jno. W. Webster, clerk.

UNITED STATES OF AMERICA,
Territory of Colorado, ss:

I, Jno. W. Webster, clerk of the supreme court of the Territory of Colorado, do hereby certify that the above and foregoing is a true, correct, complete, and perfect transcript of the record and all proceedings had in the supreme court of the Territory of Colorado, including copies of the opinions herewith transmitted in a certain cause between George C. Beckwith, appellant, and Chalmers W. Talbot, appellee, determined at the February term, A. D. 1875, of said court, as the same ap-
243 pear from the files and records in my office.

In witness whereof I have hereunto subscribed my name and affixed the seal of said supreme court, at Denver, this seventeenth day of June, A. D., 1875.

[SEAL.] JNO. W. WEBSTER,
Clerk Supreme Court, Colorado Territory.

Clerk fees for transcript:

455 fo's, @ 20	$91 00
Certif. & seal	1 00
Total	$92 00

Received payment of Geo. C. Beckwith, pl'ff in error.
JNO. W. WEBSTER,
Clerk Supreme Court.

(Indorsement on cover:) George C. Beckwith, plaintiff in error, vs. Chalmers W. Talbot, defendant in error. Error to supreme court, Territory of Colorado. Transcript.

(Second indorsement on cover:) No. 117. George C. Beckwith, plaintiff in error, vs. Chalmers W. Talbot. Colorado Terr'y sup. c't. Filed 13th September, 1875.

REC. 117—6

Supreme Court of the United States.

GEORGE C. BECKWITH
vs.
C. W. TALBOT.
No. 117.

Brief for Plaintiff in Error.

Talbot sued George C. Beckwith in the court below on the following paper:

"WET MOUNTAIN VALLEY, *October* 7, 1870.

This to certify that the undersigned have taken two thousand two hundred and five head of cattle, valued at thirty-six thousand six hundred and eighty-one dollars and sixty cents on shares, from George C. Beckwith, time to expire on the fifth day of December, one thousand eight hundred and seventy-two, then Geo. C. Beckwith to sell the cattle and retain the amount the cattle are valued at above, of the amount the cattle sell at over and above the said valuation. Geo. C. Beckwith to retain one-half, and the other half to be equally divided between C. W. Talbot, Elton T. Beckwith, and Edwin F. Beckwith.

(Signed) C. W. TALBOT,
ELTON T. BECKWITH,
EDWIN F. BECKWITH."

The amended declaration avers that the plaintiff performed his part of the contract, and that on 5th December, 1872, the cattle were worth $97,000, by reason of which he became entitled to one-sixth of the amount re-

maining after deducting $36,681.60. That George C. Beckwith had refused to sell the cattle in accordance with the agreement, and that he had settled with Elton T. and Edwin F. Beckwith.

The defendant plead the general issue, with notice of special matter, to wit, a partnership existing between plaintiff, E. T. & E. F. Beckwith, and defendant (p. 26).

The verdict was for plaintiff (p. 28). A remittitur of damages was made, and a motion for new trial refused, and case taken to Supreme Court of the Territory (Colorado) on bill of exceptions (pp. 29, 30).

The first exception was to the admission of parol evidence as to terms of the contract, on the ground that it was not to be performed within a year, and was not in writing, signed by the defendant, and therefore within the statute of frauds.

The court sustained this objection (p. 31), but ruled that it might be proved for the purpose of establishing the measure of the plaintiff's damages (p. 32). To this there was an exception.

The Judge instructed the jury that if the cattle were worth more than $36,681.60 at the expiration of the time fixed by the agreement, and if plaintiff could have obtained more for them at that time, then he could recover one-sixth part of the sum he might have obtained less the above sum. To this there was an exception (pp. 51, 52).

The defendant asked the court to instruct the jury that, if there was a joint contract, no recovery could be had by plaintiff except on proof of a settlement with E. T. & E. F. Beckwith by defendant. This was refused and exception taken (p. 52).

These exceptions will be found contained in the assignment of error in the Supreme Court of the Territory (p. 54).

There the exceptions were overruled, judgment was affirmed, and defendant prosecuted his writ of error.

Assignment of Error.

The court erred in overruling defendant's exceptions.

Statute of Frauds.

The first question to be considered is, whether the agreement is inimical to the Statute of Frauds.

As incorporated into the Revised Statutes of Colorado it reads: "Every agreement which, by its terms is not to be performed within a year, unless some note or memorandum thereof be in writing and subscribed by the party charged therewith, *shall be void.*" R. S., Col. Ter., Sec. 12, 339.

The Supreme Court of the Territory held the agreement in question was not within the statute, as a note or memorandum could be made out from certain letters signed by defendant and addressed to the plaintiff.

The first of these is dated September 21, 1872, and is found at p. 42 of the Record. In it occurs this expression: "You suggest giving you a part of the cattle. This is entirely outside of the agreement."

"The cattle must be sold and settled up according to the agreement."

"You shall have no chance to complain in my keeping up to the agreement."

In one, of November 10, 1872; "At first I thought it useless to answer your letter, as I am bound by the agreement to sell the cattle in a very short time. "Does the agreement say that I was to say any thing to you or to any one else?"

defendant, said: "I cannot connect the subscription of the plaintiff's name in the book with the prospectus, nor does the defendant's letter refer to the prospectus. *It speaks, indeed, of his engagement with the proprietors of the Boydell Shakespeare, but it cannot be shown to be the engagement contained in the particular prospectus, without parole evidence, which the statute excludes.*"

11 East, 156.

In the case at bar the letters contained some mention of *an agreement*, and the court below, by the use of extrinsic proof, applies this language to the unsigned paper before-mentioned. Multiplication of authority would not more clearly show this was error.

Nor does the use of this evidence derive any force on the ground that it was derived from the defendant. What is excluded is *parole* evidence, and that on the ground of public policy. Its source is immaterial.

The court below is unfortunate in the citation of authorities to support its ruling. The first, is that of *Jackson* vs. *Lowe*, 1 Bing, 9. Here there was no question of parole evidence. A notice was made out and sent by the plaintiff to defendant, which contained an assertion of the contract, specifying the quantity, quality and price, and was dated 24*th September*.

To this the defendant replied, saying, "I have your notice of 24*th September*, in reply, I have to state, &c. He does not deny the contract, but alleges part performance. The sole question was, whether the jury were not warranted in concluding that both parties had the same contract in view.

In *Gale* vs. *Nixon* the second case relied on, a complete contract for the sale of the land signed by the vendor, was made and delivered to the vendees, who went into possession, and made an endorsement upon it under their

miah, who brought the action, but the court held parol evidence was not admissible to show the mistake.

"That the letter was really designed for John and Jeremiah Naylor cannot be doubted, but the principles which require that the promise to pay the debt of another shall be in writing, and which will not permit a written contract to be explained by parol testimony, originate in a generous and wise policy, which this court will not relax, so as to except from its operation cases within the principle. Already have so many cases been taken out of the statute of frauds, which seem to be within its letter, that it may well be doubted whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard. The best judges of England have been of opinion that this relaxing construction of the statute ought not to be carried further than it has already been carried, and this court entirely concurs in that opinion."

4 Cr. 234.

These cases contain a repetition of what was held by Lord ELLENBOROUGH in the leading case of *Boydell* vs. *Drummond*.

The defendant had subscribed for the celebrated edition of Shakespeare, published by Alderman Boydell, and signed his name in a book which had for its title, "Shakespeare's Subscribers, their signatures." At the time, there was lying in the shop copies of a prospectus, containing the terms of subscription, which it was the custom of the plaintiff to deliver to each subscriber. The defendant paid for part of the subscription but refused remainder, and wrote a letter to plaintiff, in which he said that he had ceased taking the numbers of the Boydell Shakespeare some years ago, and not having been applied to until very lately, he did not consider himself called upon to complete the set.

Lord ELLENBOROUGH, delivering judgment in favor of

Argument.

The court will notice that the Colorado statute differs from that of Charles II in this particular, that the former pronounces the contract *void*, while the latter only bars a *recovery*.

The first question is, there being no contract signed by the party to be bound, whether there exists a memorandum of such contract signed by him. It is not denied that the terms of the agreement may be in one paper and the signature in another. But when the bargain is to be made out from separate written papers, parole evidence is not allowed to connect them, but they must either be physically attached together or they must be connected by reference in the contents of one to the contents of the other.

Benjamin Sales 155.

This court holds the same: "The contract may be collected from several distinct papers taken together as forming parts of an entire transaction, *if they are connected by express reference from the one to the other*.

Salmon Fall Manufacturing Co. vs *Goddard*, 14 How. 147.

In this case there was a memorandum of sale made out, and at the same time a bill of parcels was sent to the defendant Goddard. The court permitted parole evidence to show the meaning in trade of this memorandum, and held, also, it was competent to refer to the bill of parcels, for the purpose, of explanation.

Mr. Justice CURTIS delivered a very strong dissenting opinion which was concurred in by Justice CATRON. He referred to the case of *Grant* vs. *Naylor*, in which the opinion of the court was delivered by Chief Justice Marshall.

A letter of credit had been addressed by mistake to John and *Joseph* Naylor, and delivered to John and *Jere-*

hand and seal, stating an arrangement they had entered into, to let other parties have a part of the land, and that they did thereby discharge the plaintiff from so much of his agreement as bound him to convey this portion. Neither in this case was there any question of parole evidence.

6 Cow., 448.

Partnership.

Another ground on which defendant relies on reversing the judgment is, that waiving the statute of frauds, no recovery could be had by Talbot in this action, inasmuch as the agreement constituted a partnership between himself, E. T. & E. F. Beckwith and George C. Beckwith.

The Supreme Court held that the contract did not constitute a partnership. p. 79.

It has long been a settled law that one partner cannot maintain an action at law against his co-partner, to recover any sum of money claimed to be due by virtue of their joint undertaking, prior to an account stated.

The contract certifies, that the undersigned had taken so many head of cattle on *shares* from George C. Beckwith, at a certain valuation, the time to expire at a certain date, when the last named was to sell the cattle and, retaining the amount of valuation, and of the amount of sale above the valuation, he was to retain the one half, the other half to be equally divided between C. W. Talbot, Elton T. Beckwith and Edwin F. Beckwith. R. 75.

That this was a partnership undertaking is clear. The defendant, instead of advancing the money to purchase the stock in trade, gave the cattle. Talbot and E. T. and E. F. Beckwith were to contribute their labor, and the profits were the advance in the value of the cattle through their care.

This was all that was necessary to constitute a valid partnership. This was the law as found in Gaius, and continues the law until the present day :

"*Nam et eta posse coire societatem constat, ut unus pecuniam conferat, alter non conferat et tamen lucrum inter eos commune sit ; saepe enim opera alicujus pro pecunia valet.*"

And, he adds, that a partnership may be so constituted that one should not suffer a loss at all, but should take part in the profit, provided his services be so valuable as to admit him into the partnership on these terms.

Gaius. Comm. III, 149.

And so Vinnius says a sharing in the loss is not of the essence of the contract. "*Sed nec damni communio ad substantiam societatis pertinet.*"

Comm., l. 3, t. 26.

This is fully endorsed, (Collyer Part., § 18,) and has often been decided.

In no material particular does this case differ from *Ward* vs. *Thompson*. The memorandum of agreement between the parties recited that the Wards agreed to allow Thompson to run the steamer Detroit in a line under the control of Thompson, who was to appoint all the officers and crew except purser, who was to be under the control of the Wards. The receipts of the steamer were to be applied first for expenses; second, insuring steamer; third, Wards to be paid out of the first nett earnings $6,000; fourth, "all the remaining balance, after paying the above, to be equally divided between Ward and Thompson.

Ward filed a libel in the District Court on this agreement. The answer alleged that the writing was a contract of partnership, and not a charter party. The Circuit Court sustained the defence, and this Court, in affirming the judgment, speaking through GRIER, J., say :

"A contract of partnership is where parties join together their money, goods, labor, or skill, for the purposes of gain and trade, and where there is a community of profit"

Here we have every thing necessary to constitute a partnership.

1st. The parties have *joined* together to carry on a certain adventure or trade, for their mutual benefit—one contributing the vessel, the other his skill, labor and experience.

2d. There is a communion of profits on a fixed ratio.

22 How. 330; *V. Marble Co.* vs. *Ripley*, 10, W. 350.

In *Seymour* vs. *Freer*, there was an argument that Freer should purchase land—purchase money to be advanced by Seymour. After a certain time the land was to be sold, and after re-payment of the purchase money, out of the profits there was to be paid Freer one-half, *which* should *be in full of his services and expenses.*

The court held this was not a partnership. The agreement showed on its face that the one-half profits was only a payment to Freer for his services *as agent.*

8 Wall. 202.

In the case at bar no such question is involved. All parties were to share in the profits equally. Talbot and the two Beckwiths had a specific interest in the profits themselves *as profits.* Plaintiff contributed the money and defendant, with the two Beckwiths, their service and care. They all embarked in the speculation *on shares.*

On this point we will cite but one other authority, that of *Beauregard* vs. *Case* decided as late as 1875. The agreement recited that B. should obtain the lease of a road, take charge and control it, for the mutual benefit of the parties, and that G & M should furnish the necessary money to be reimbursed out of the net profits.

After repayment the profits were to be equally divided between the parties, share and share alike.

Say the court, "there was in this agreement all the essential conditions for the creation of a partnership. The postponement of a division of profits until the capital advanced should be refunded, did not alter the character of the agreement as one of partnership."

Beauregard vs. *Case*, 91 U. S., 141.

It is hardly necessary to cite authority to show there may be a partnership in profits without ownership in stock.

Bershold vs. *Godsmith*, 24 How., 542, Lond. Part.

Contracts of a very similar nature to the one in this case are well known and recognized under the French law. They are called "Cheptels," and arise when an owner of a herd of cattle turns them over to a person at a valuation, who undertakes to herd, feed, and care for them a certain time, with the understanding that, excepting the milk, dung, and labor of the beasts, all the profits increase shall be common between the parties.

There are two kinds of "cheptels:" *Simple*, where the cattle are wholly supplied by one party; and, *by moiety*, where the undertaker supplies one half.

Porthier treats this engagement as one of partnership. "In one respect," says he, "this contract differs from all other forms of partnership; it is not dissolved by death; the rights and duties under it descend to the representatives of the parties. This does not prevent it from being a true partnership, for though it be in the nature of a partnership to be dissolved by death, it is not of its essence."

He adds that there is another kind of "cheptels," which results where a man sends to another his cow to lodge and take care of at his own risk, and gives, as a recompense for his care, the milk of the cow.

"This is not a partnership contract, for it is of the essence of this contract that the parties should put something in common, and should contract with a view of making a common gain. Here they put in nothing and share nothing."

Porthier Traité Des Cheptels, sec. 1, art. Prelim & Art. 1, sec. 1, § 1 & sec. II, *a* III.

Joint Contract.

If either of the two preceeding grounds are incorrect, a third fatal objection to plaintiff below recovering, is that the contract made by plaintiff in error with Talbot, E. T. Beckwith, and E. F. Beckwith was joint, and Talbot cannot sue alone.

That he was aware of this is plain, for he endeavors to get over the objection by stating in his declaration defendant had settled with his co-obligees. This allegation is not supported by a particle of evidence. The only witness (Elton T. Beckwith) examined as to this point, swears that he never received anything in settlement of his proportion of the profits. (R., p. 45.)

By the agreement, C. W. Talbot, E. T. Beckwith and E. F. Beckwith, were to take the cattle on shares, and on the expiration of a certain time George C. Beckwith was to sell the cattle, retain one-half of the profits, and the other half to be equally divided between C. W. Talbot, Elton T. Beckwith and Edwin F. Beckwith.

There is nothing in this agreement taking it out of the general rule governing joint contracts. Says Parson "As a contract with several persons for the paymen to them of a sum of money, is a joint contract with all and all the payees have therein a joint interest, so tha no one can sue alone for his proportion; *so the designating the share of each will not create such a severance of inter-*

est as to sustain a several action; but all must join in an action for the whole.

1 Pars. Con., 5th Ed. p. 13.

The interest here spoken of is an interest *in the contract*, and not in any sum of money or other benefit to be received from it. Ib. 14.

He adds, that where the payment is in the first place of one sum "*in solido*," and this is afterwards to be divided among the payees there, generally; the interest of the payees is joint. 19.

This is fully supported by the decision of this court in *Farni* vs. *Tesson*. Here Farni and others signed an injunction bond to restrain execution on a judgment. Tesson and others were the obligees, but he sued alone on the bond, averring he was the only one *interested in the judgment*. As to his ability to maintain the suit, this court says:

He sues on a several covenant to pay a sum of money to A., and shows a covenant to pay A. B. and C. jointly. *If by the condition the money to be recovered be not for the joint benefit of all, the suggestion of that fact cannot alter the obligation*, but will show only that though all the parties to it should join in the suit and show a legal title to recover, the judgment, will, before the use of the party named in the condition, and equitable, entitled to the money. In this case, says the court, it will admit of no construction—the covenant is joint.

1 Black, 309.

Tested by these principles the contract cannot but be considered as joint. The service to be performed is by three persons not one, and the correlative obligation to pay for such service is one made jointly to the three. And so it is stated in the declaration, that the plaintiff and Elton T. and Edwin F. Beckwith undertook to take

care of the cattle, and in consideration of the undertaking the defendant *promised plaintiff and E. T. and E. F. Beckwith*, &c. &c. p. 9.

If the agreement in question is either within the statute of frauds of Colorado, or constitute a partnership, or is a joint contract, than the judgment of the court below must be reversed.

P. PHILLIPS,
W. H. PHILLIPS,
for Plaintiff in Error.

Nov 22 1877
Ed Doyle

Supreme Court of the United States.

GEORGE C. BECKWITH
vs.
C. W. TALBOT.
} No. 117.

Brief for Plaintiff in Error.

P. PHILLIPS,
W. H. PHILLIPS,
for Plaintiff in Error.

November 22d, 1877.

R. O. Polkinhorn, Printer, Washington, D. C.



Supreme Court of the United States.

GEORGE C. BECKWITH
vs.
C. W. TALBOT.
No. 117.

Brief for Plaintiff in Error.

Talbot sued George C. Beckwith in the court below on the following paper:

"WET MOUNTAIN VALLEY, *October* 7, 1870.

This to certify that the undersigned have taken two thousand two hundred and five head of cattle, valued at thirty-six thousand six hundred and eighty-one dollars and sixty cents, on shares, from George C. Beckwith, time to expire on the fifth day of December, one thousand eight hundred and seventy-two, then Geo. C. Beckwith to sell the cattle and retain the amount the cattle are valued at above, of the amount the cattle sell at over and above the said valuation, Geo. C. Beckwith to retain one-half, and the other half to be equally divided between C. W. Talbot, Elton T. Beckwith, and Edwin F. Beckwith.

(Signed) C. W. TALBOT,
ELTON T. BECKWITH,
EDWIN F. BECKWITH."

The amended declaration avers that the plaintiff performed his part of the contract, and that on 5th December, 1872, the cattle were worth $97,000, by reason of which he became entitled to one-sixth of the amount re-

maining after deducting $36,681.60. That George C. Beckwith had refused to sell the cattle in accordance with the agreement, and that he had settled with Elton T. and Edwin F. Beckwith.

The defendant plead the general issue, with notice of special matter, to wit, a partnership existing between plaintiff, E. T. & E. F. Beckwith, and defendant (p. 26).

The verdict was for plaintiff (p. 28). A remittitur of damages was made, and a motion for new trial refused, and case taken to Supreme Court of the Territory (Colorado) on bill of exceptions (pp. 29, 30).

The first exception was to the admission of parol evidence as to terms of the contract, on the ground that it was not to be performed within a year, and was not in writing, signed by the defendant, and therefore within the statute of frauds.

The court sustained this objection (p. 31), but ruled that it might be proved for the purpose of establishing the measure of the plaintiff's damages (p. 32). To this there was an exception.

The Judge instructed the jury that if the cattle were worth more than $36,681.60 at the expiration of the time fixed by the agreement, and if plaintiff could have obtained more for them at that time, then he could recover one-sixth part of the sum he might have obtained less the above sum. To this there was an exception (pp. 51, 52).

The defendant asked the court to instruct the jury that, if there was a joint contract, no recovery could be had by plaintiff except on proof of a settlement with E. T. & E. F. Beckwith by defendant. This was refused and exception taken (p. 52).

These exceptions will be found contained in the assignment of error in the Supreme Court of the Territory (p. 54).

There the exceptions were overruled, judgment was affirmed, and defendant prosecuted his writ of error.

Assignment of Error.

The court erred in overruling defendant's exceptions.

Statute of Frauds.

The first question to be considered is, whether the agreement is inimical to the Statute of Frauds.

As incorporated into the Revised Statutes of Colorado it reads: "Every agreement which, by its terms is not to be performed within a year, unless some note or memorandum thereof be in writing and subscribed by the party charged therewith, *shall be void.*" R. S., Col. Ter., Sec. 12, 339.

The Supreme Court of the Territory held the agreement in question was not within the statute, as a note or memorandum could be made out from certain letters signed by defendant and addressed to the plaintiff.

The first of these is dated September 21, 1872, and is found at p. 42 of the Record. In it occurs this expression: "You suggest giving you a part of the cattle. This is entirely outside of the agreement."

"The cattle must be sold and settled up according to the agreement."

"You shall have no chance to complain in my keeping up to the agreement."

In one, of November 10, 1872; "At first I thought it useless to answer your letter, as I am bound by the agreement to sell the cattle in a very short time. "Does the agreement say that I was to say any thing to you or to any one else?"

Argument.

The court will notice that the Colorado statute differs from that of Charles II in this particular, that the former pronounces the contract *void*, while the latter only bars a *recovery*.

The first question is, there being no contract signed by the party to be bound, whether there exists a memorandum of such contract signed by him. It is not denied that the terms of the agreement may be in one paper and the signature in another. But when the bargain is to be made out from separate written papers, parole evidence is not allowed to connect them, but they must either be physically attached together or they must be connected by reference in the contents of one to the contents of the other.

Benjamin Sales 155.

This court holds the same: "The contract may be collected from several distinct papers taken together as forming parts of an entire transaction, *if they are connected by express reference from the one to the other.*

Salmon Fall Manufacturing Co. vs *Goddard*, 14 How. 147.

In this case there was a memorandum of sale made out, and at the same time a bill of parcels was sent to the defendant Goddard. The court permitted parole evidence to show the meaning in trade of this memorandum, and held, also, it was competent to refer to the bill of parcels, for the purpose, of explanation.

Mr. Justice CURTIS delivered a very strong dissenting opinion which was concurred in by Justice CATRON. He referred to the case of *Grant* vs. *Naylor*, in which the opinion of the court was delivered by Chief Justice Marshall.

A letter of credit had been addressed by mistake to John and *Joseph* Naylor, and delivered to John and *Jere-*

miah, who brought the action, but the court held parol evidence was not admissible to show the mistake.

"That the letter was really designed for John and Jeremiah Naylor cannot be doubted, but the principles which require that the promise to pay the debt of another shall be in writing, and which will not permit a written contract to be explained by parol testimony, originate in a generous and wise policy, which this court will not relax, so as to except from its operation cases within the principle. Already have so many cases been taken out of the statute of frauds, which seem to be within its letter, that it may well be doubted whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard. The best judges of England have been of opinion that this relaxing construction of the statute ought not to be carried further than it has already been carried, and this court entirely concurs in that opinion."

4 Cr. 234.

These cases contain a repetition of what was held by Lord ELLENBOROUGH in the leading case of *Boydell* vs. *Drummond*.

The defendant had subscribed for the celebrated edition of Shakespeare, published by Alderman Boydell, and signed his name in a book which had for its title, "Shakespeare's Subscribers, their signatures." At the time, there was lying in the shop copies of a prospectus, containing the terms of subscription, which it was the custom of the plaintiff to deliver to each subscriber. The defendant paid for part of the subscription but refused remainder, and wrote a letter to plaintiff, in which he said that he had ceased taking the numbers of the Boydell Shakespeare some years ago, and not having been applied to until very lately, he did not consider himself called upon to complete the set.

Lord ELLENBOROUGH, delivering judgment in favor of

defendant, said: "I cannot connect the subscription of the plaintiff's name in the book with the prospectus, nor does the defendant's letter refer to the prospectus. *It speaks, indeed, of his engagement with the proprietors of the Boydell Shakespeare, but it cannot be shown to be the engagement contained in the particular prospectus, without parole evidence, which the statute excludes.*"

11 East, 156.

In the case at bar the letters contained some mention of *an agreement*, and the court below, by the use of extrinsic proof, applies this language to the unsigned paper before-mentioned. Multiplication of authority would not more clearly show this was error.

Nor does the use of this evidence derive any force on the ground that it was derived from the defendant. What is excluded is *parole* evidence, and that on the ground of public policy. Its source is immaterial.

The court below is unfortunate in the citation of authorities to support its ruling. The first, is that of *Jackson* vs. *Lowe*, 1 Bing, 9. Here there was no question of parole evidence. A notice was made out and sent by the plaintiff to defendant, which contained an assertion of the contract, specifying the quantity, quality and price, and was dated 24*th September*.

To this the defendant replied, saying, "I have your notice of 24*th September*, in reply, I have to state, &c. He does not deny the contract, but alleges part performance. The sole question was, whether the jury were not warranted in concluding that both parties had the same contract in view.

In *Gale* vs. *Nixon* the second case relied on, a complete contract for the sale of the land signed by the vendor, was made and delivered to the vendees, who went into possession, and made an endorsement upon it under their

hand and seal, stating an arrangement they had entered into, to let other parties have a part of the land, and that they did thereby discharge the plaintiff from so much of his agreement as bound him to convey this portion. Neither in this case was there any question of parole evidence.

6 Cow., 448.

Partnership.

Another ground on which defendant relies on reversing the judgment is, that waiving the statute of frauds, no recovery could be had by Talbot in this action, inasmuch as the agreement constituted a partnership between himself, E. T. & E. F. Beckwith and George C. Beckwith.

The Supreme Court held that the contract did not constitute a partnership. p. 79.

It has long been a settled law that one partner cannot maintain an action at law against his co-partner, to recover any sum of money claimed to be due by virtue of their joint undertaking, prior to an account stated.

The contract certifies, that the undersigned had taken so many head of cattle on *shares* from George C. Beckwith, at a certain valuation, the time to expire at a certain date, when the last named was to sell the cattle and, retaining the amount of valuation, and of the amount of sale above the valuation, he was to retain the one half, the other half to be equally divided between C. W. Talbot, Elton T. Beckwith and Edwin F. Beckwith. R. 75.

That this was a partnership undertaking is clear. The defendant, instead of advancing the money to purchase the stock in trade, gave the cattle. Talbot and E. T. and E. F. Beckwith were to contribute their labor, and the profits were the advance in the value of the cattle through their care.

This was all that was necessary to constitute a valid partnership. This was the law as found in Gaius, and continues the law until the present day :

"*Nam et eta posse coire societatem constat, ut unus pecuniam conferat, alter non conferat et tamen lucrum inter eos commune sit ; saepe enim opera alicujus pro pecunia valet.*"

And, he adds, that a partnership may be so constituted that one should not suffer a loss at all, but should take part in the profit, provided his services be so valuable as to admit him into the partnership on these terms.

Gaius. Comm. III, 149.

And so Vinnius says a sharing in the loss is not of the essence of the contract. "*Sed nec damni communio ad substantiam societatis pertinet.*"

Comm., l. 3, t. 26.

This is fully endorsed, (Collyer Part., § 18,) and has often been decided.

In no material particular does this case differ from *Ward* vs. *Thompson*. The memorandum of agreement between the parties recited that the Wards agreed to allow Thompson to run the steamer Detroit in a line under the control of Thompson, who was to appoint all the officers and crew except purser, who was to be under the control of the Wards. The receipts of the steamer were to be applied first for expenses; second, insuring steamer; third, Wards to be paid out of the first nett earnings $6,000; fourth, "all the remaining balance, after paying the above, to be equally divided between Ward and Thompson.

Ward filed a libel in the District Court on this agreement. The answer alleged that the writing was a contract of partnership, and not a charter party. The Circuit Court sustained the defence, and this Court, in affirming the judgment, speaking through GRIER, J., say :

"A contract of partnership is where parties join together their money, goods, labor, or skill, for the purposes of gain and trade, and where there is a community of profit."

Here we have every thing necessary to constitute a partnership.

1st. The parties have *joined* together to carry on a certain adventure or trade, for their mutual benefit—one contributing the vessel, the other his skill, labor and experience.

2d. There is a communion of profits on a fixed ratio.
22 How. 330; *V. Marble Co.* vs. *Ripley*, 10, W. 350.

In *Seymour* vs. *Freer*, there was an argument that Freer should purchase land—purchase money to be advanced by Seymour. After a certain time the land was to be sold, and after re-payment of the purchase money, out of the profits there was to be paid Freer one-half, *which* should *be in full of his services and expenses.*

The court held this was not a partnership. The agreement showed on its face that the one-half profits was only a payment to Freer for his services *as agent.*
8 Wall. 202.

In the case at bar no such question is involved. All parties were to share in the profits equally. Talbot and the two Beckwiths had a specific interest in the profits themselves *as profits.* Plaintiff contributed the money and defendant, with the two Beckwiths, their service and care. They all embarked in the speculation *on shares.*

On this point we will cite but one other authority, that of *Beauregard* vs. *Case* decided as late as 1875. The agreement recited that B. should obtain the lease of a road, take charge and control it, for the mutual benefit of the parties, and that G & M should furnish the necessary money to be reimbursed out of the net profits.

After repayment the profits were to be equally divided between the parties, share and share alike.

Say the court, "there was in this agreement all the essential conditions for the creation of a partnership. The postponement of a division of profits until the capital advanced should be refunded, did not alter the character of the agreement as one of partnership."

Beauregard vs. *Case*, 91 U. S., 141.

It is hardly necessary to cite authority to show there may be a partnership in profits without ownership in stock.

Bershold vs. *Godsmith*, 24 How., 542, Lind. Part.

Contracts of a very similar nature to the one in this case are well known and recognized under the French law. They are called "Cheptels," and arise when an owner of a herd of cattle turns them over to a person at a valuation, who undertakes to herd, feed, and care for them a certain time, with the understanding that, excepting the milk, dung, and labor of the beasts, all the profits increase shall be common between the parties.

There are two kinds of "cheptels:" *Simple*, where the cattle are wholly supplied by one party; and, *by moiety*, where the undertaker supplies one half.

Porthier treats this engagement as one of partnership. "In one respect," says he, "this contract differs from all other forms of partnership; it is not dissolved by death; the rights and duties under it descend to the representatives of the parties. This does not prevent it from being a true partnership, for though it be in the nature of a partnership to be dissolved by death, it is not of its essence."

He adds that there is another kind of "cheptels," which results where a man sends to another his cow to lodge and take care of at his own risk, and gives, as a recompense for his care, the milk of the cow.

"This is not a partnership contract, for it is of the essence of this contract that the parties should put something in common, and should contract with a view of making a common gain. Here they put in nothing and share nothing."

Porthier Traité Des Cheptels, sec. 1, art. Prelim & Art. 1, sec. 1, § 1 & sec. II, *a* III.

Joint Contract.

If either of the two preceeding grounds are incorrect, a third fatal objection to plaintiff below recovering, is that the contract made by plaintiff in error with Talbot, E. T. Beckwith, and E. F. Beckwith was joint, and Talbot cannot sue alone.

That he was aware of this is plain, for he endeavors to get over the objection by stating in his declaration defendant had settled with his co-obligees. This allegation is not supported by a particle of evidence. The only witness (Elton T. Beckwith) examined as to this point, swears that he never received anything in settlement of his proportion of the profits. (R., p. 45.)

By the agreement, C. W. Talbot, E. T. Beckwith and E. F. Beckwith, were to take the cattle on shares, and on the expiration of a certain time George C. Beckwith was to sell the cattle, retain one-half of the profits, and the other half to be equally divided between C. W. Talbot, Elton T. Beckwith and Edwin F. Beckwith.

There is nothing in this agreement taking it out of the general rule governing joint contracts. Says Parson: "As a contract with several persons for the paymen to them of a sum of money, is a joint contract with all and all the payees have therein a joint interest, so tha no one can sue alone for his proportion; *so the designating the share of each will not create such a severance of inter-*

est as to sustain a several action; but all must join in an action for the whole.

1 Pars. Con., 5th Ed. p. 13.

The interest here spoken of is an interest *in the contract*, and not in any sum of money or other benefit to be received from it. Ib. 14.

He adds, that where the payment is in the first place of one sum "*in solido*," and this is afterwards to be divided among the payees there, generally; the interest of the payees is joint. 19.

This is fully supported by the decision of this court in *Farni* vs. *Tesson*. Here Farni and others signed an injunction bond to restrain execution on a judgment. Tesson and others were the obligees, but he sued alone on the bond, averring he was the only one *interested in the judgment*. As to his ability to maintain the suit, this court says:

He sues on a several covenant to pay a sum of money to A., and shows a covenant to pay A. B. and C. jointly. *If by the condition the money to be recovered be not for the joint benefit of all, the suggestion of that fact cannot alter the obligation*, but will show only that though all the parties to it should join in the suit and show a legal title to recover, the judgment, will, before the use of the party named in the condition, and equitable, entitled to the money. In this case, says the court, it will admit of no construction—the covenant is joint.

1 Black, 309.

Tested by these principles the contract cannot but be considered as joint. The service to be performed is by three persons not one, and the correlative obligation to pay for such service is one made jointly to the three. And so it is stated in the declaration, that the plaintiff and Elton T. and Edwin F. Beckwith undertook to take

care of the cattle, and in consideration of the undertaking the defendant *promised plaintiff and E. T. and E. F. Beckwith*, &c. &c. p. 9.

If the agreement in question is either within the statute of frauds of Colorado, or constitute a partnership, or is a joint contract, than the judgment of the court below must be reversed.

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